2005

Douglas L. Stowell, Personal Representative of the Estate of Gary W. Ostler v. Ostler International, Inc., Ostler Property Development, Inc., Dale Ostler, and Vyron Ostler : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

DOUGLAS L. STOWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY W. OSTLER, deceased, Plaintiff and Appellant, vs. OSTLER INTERNATIONAL, INC., a Utah corporation; OSTLER PROPERTY DEVELOPMENT, INC., a Utah corporation; DALE OSTLER; and VYRON OSTLER, Defendants and Appellees.	:	Case No. 20050636-SC

BRIEF OF APPELLEES OSTLER INTERNATIONAL, INC. AND OSTLER PROPERTY DEVELOPMENT, INC.

Appeal from a Final Judgment Entered by the
Third Judicial District Court for Salt Lake County, State of Utah
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BRIEF OF APPELLEES OSTLER INTERNATIONAL, INC. AND OSTLER PROPERTY DEVELOPMENT, INC.

I. STATEMENT CONCERNING JURISDICTION

This case is an appeal of an order of dismissal entered by the Third Judicial District Court. This Court has jurisdiction of this matter pursuant to UTAH CODE ANN. § 78-2-2(j).

II. CONTROLLING STATUTORY PROVISIONS

Copies of controlling statutory provisions are included in Addendum No. 1 attached to this brief, and include the following:

UTAH CODE ANN. § 16-10a-728
UTAH CODE ANN. § 16-10a-732
UTAH CODE ANN. § 16-10a-801
UTAH CODE ANN. § 16-10a-805
UTAH CODE ANN. § 16-10a-810
UTAH CODE ANN. § 25-5-4
UTAH CODE ANN. § 25-5-8

III. STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

A. ISSUES PRESENTED

1. Whether UTAH CODE ANN. § 16-10a-732 is mandatory and unambiguously dictates that a shareholder agreement providing for management of a corporation in a manner inconsistent with the Utah Corporation Act is invalid if not in writing. (Preserved for appeal at Record on Appeal ("ROA") pp. 39-52, 322-323.)

2. Whether UTAH CODE ANN. § 16-10a-732 requires that a shareholder agreement providing for management of a corporation in a manner inconsistent with the Utah Corporation Act expires after ten years when the term agreed upon by the parties in the alleged agreement is indefinite. (Preserved for appeal at ROA pp. 113-138, 322-323.)

3. Whether an alleged shareholder agreement providing for the management of a corporation in a manner inconsistent with the Utah Corporation Act is inheritable when the agreement would require a personal relationship among shareholders in managing the corporation, including establishing and implementing all company policies and programs, developing business ventures, and making decisions concerning the use of profits. (Preserved for appeal at ROA pp. 39-52, 324.)

4. Whether the trial court properly dismissed the Estate's Claims when the Estate concedes that all claims for damages are barred by UTAH CODE ANN. § 25-5-4(1)

and the equitable remedy of specific performance is not available to compel parties to engage in a personal relationship of trust in managing and operating a business. (Preserved for appeal at ROA pp. 272-275.)

B. STANDARD OF REVIEW

The district court dismissed the complaint in this matter pursuant to UTAH RULE CIV. P. 12(b)6. Dismissal of a complaint pursuant to Rule 12(b)6 is reviewed for correctness, giving no deference to the trial court's decision. *Educators Mutual Ins. Ass'n. v. Allied Property and Casualty Ins. Co.,* 890 P.2d 1029 (Utah 1995).

IV. STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Plaintiff/Appellant in this matter is Douglas Stowell, an attorney who is acting as the personal representative of the estate of Gary Ostler (the Plaintiff/Appellant is hereinafter referred to as the "Estate" and Gary Ostler is hereinafter referred to as "Gary"). After Gary's death, the Estate brought this action against Gary's brother, Dale Ostler (hereinafter "Dale"), another brother Vyron Ostler ("Vyron"), and Defendants/Appellees Ostler International, Inc. and Ostler Property Development, Inc. (these companies are hereinafter referred to as the "Corporate Defendants"). The complaint seeks to enforce an alleged oral agreement between Dale and Gary, as shareholders, concerning how the Corporate Defendants would be managed. The trial court granted the motions to dismiss filed by Dale, Vyron, and the Corporate Defendants, and this appeal followed.

In dismissing the complaint, the trial court concluded that (1) The shareholder agreement alleged in the complaint would purport to permit the Corporate Defendants "to

operate outside of the requirements" of the Utah Revised Business Corporation Act (hereinafter the "Corporation Act") (ROA, p. 322-323)[1]; (2) UTAH CODE ANN. § 16-10a-732(2) is mandatory, and requires that the kind of shareholder agreement alleged in the complaint "shall be" in writing to be in enforceable (*Id.*); (3) Even if the shareholder agreement were otherwise enforceable, UTAH CODE ANN. § 16-10a-732(2) provides that the kind of shareholder agreement alleged in the complaint would expire after ten years unless the parties agreed to a different term (*Id.*); (4) The agreement as alleged in the complaint was personal to Gary and Dale and ended when Gary died (ROA p. 324).

The complaint in this matter alleges an oral agreement between Dale and Gary, dating from the time the Corporate Defendants were incorporated, that neither of the Corporate Defendants would implement any policy or business practice without the consent of both Gary and Dale as shareholders. The complaint bases the alleged oral agreement at least in part upon "custom, usage, and course of dealing," (*Id.* at ¶¶ 27 & 33, ROA, pp. 7-8 & 10-11). Ostler International was incorporated in 1988 and Ostler Property was incorporated in 1993. (*Id.* at ¶¶ 8 & 9, ROA pp. 2 & 3). Dale and Gary each owned fifty percent of the stock of the Corporate Defendants. (Complaint, ¶¶ 3-4, ROA p. 2.[2])

After Gary's death, Dale appointed Vyron to fill Gary's vacant seat on the boards of directors of the Corporate Defendants. (ROA, pp. 42-43.) In the Complaint, the Estate

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[1] A copy of the trial court's decision is attached as Addendum No. 2.
[2] The Complaint is attached hereto as Addendum No. 3.

claims to be the successor in interest to the alleged agreement between Dale and Gary, and asserts that since Gary's death, Dale, Vyron, and the Corporate Defendants have not permitted the Estate to participate in the management of the companies. (*Id.* at ¶ 25, ROA, pp. 6-7) The Estate requests damages as well as an order compelling the Corporate Defendants to permit the Estate to participate in adopting and implementing all business decisions and practices of the Corporate Defendants, including decisions concerning the use of profits. (*Id.* at ¶¶ 31 & 37, ROA pp. 9 &11).

V. SUMMARY OF THE ARGUMENT

The Estate concedes that its complaint in this matter is premised upon an alleged shareholder agreement that provided for a manner of governing the Corporate Defendants that is inconsistent with the Corporation Act. The agreement is inconsistent with the Corporation Act because the agreement provided for the management of the Corporate Defendants by their shareholders rather than by a board of directors. The Corporation Act requires that corporations "must" have a board of directors and the directors "shall" manage corporations. Because the shareholder agreement is inconsistent with the Corporation Act, the agreement is only enforceable and valid if it complies with UTAH CODE ANN. § 16-10a-732.

Section 732 requires that shareholder agreements that are inconsistent with the Corporation Act "shall" be in writing. Section 732 further requires that unless the parties agree to a different term, shareholder agreements that are inconsistent with the Corporation Act will expire after ten years. Section 732 uses the mandatory word "shall," and courts are left with no choice but to apply the plain language of a mandatory

statute. The shareholder agreement alleged in the complaint is invalid because it was not in writing. In addition, even if it were enforceable, it has expired under the ten year term imposed by the statute.

Because § 732 is clear and unambiguous, the Court need not look to secondary sources, such as the official commentary, to construe it. In any event, the official commentary supports the trial court's determination that the shareholder agreement is unenforceable. According to the official commentary, one of the purposes of § 732 is to provide "predictability" and "legal certainty" concerning shareholder agreements. The statute seeks to obtain this goal by requiring a written agreement setting out the terms of the agreement. The oral shareholder agreement alleged in the complaint, which is based upon "custom, usage, and course of dealing," does not comport with the statute's purpose of obtaining "predictability" and "legal certainty" through a written agreement.

The Estate's position in this case is premised upon the assumption that the alleged agreement between Gary and Dale is inheritable as a matter of law. This position is in error. Some contract rights are personal to the holder and may not be inherited or assigned, including rights where personal needs and trust are dominant. The Estate's complaint in this matter asserts that Gary and Dale agreed to operate the Corporate Defendants informally, similar to a partnership. This may be permissible as long as the agreement complies with UTAH CODE ANN. § 16-10a-732. However, the right to participate in management of a business as a partner is highly personal in nature, and should not be involuntarily imposed upon anyone. The Estate's position would lead to an

absurd and unworkable result, requiring that the heirs of Gary and Dale are forever compelled to engage in a personal relationship of trust in managing the business.

The only potential remedy at issue in this case is whether the Estate may obtain an order of specific performance requiring Dale and the heirs of Gary to work together in managing the business of the Corporate Defendants. The Estate agrees that any damage claim it may have is barred by the statute of frauds as found in UTAH CODE ANN. § 25-5-4(1), thus leaving at issue only the claims seeking specific performance. However, courts refuse to order specific performance of agreements, such as partnership agreements, that would require parties to work together in personal relationships of trust. Courts also decline to order specific performance when to do so would impose a heavy burden of ongoing judicial supervision and intervention. Requiring unwilling parties to work together perpetually as partners is obviously problematic. It will result in uncertainty and contention related to the management of the Corporate Defendants and will require ongoing judicial intervention.

VI. ARGUMENT

A. UTAH CODE ANN. § 16-10a-732 IS MANDATORY AND UNAMBIGUOUSLY DICTATES THAT A SHAREHOLDER AGREEMENT PROVIDING FOR MANAGEMENT OF A CORPORATION IN A MANNER INCONSISTENT WITH THE CORPORATION ACT IS INVALID IF NOT IN WRITING.

The Estate's Complaint in this matter attempts to allege an oral agreement whereby Gary and Dale, as shareholders of the corporations, would always manage the companies jointly, and the companies could not implement any policy or business decision without the consent of both. As conceded by the Estate, these allegations assert

an oral shareholder agreement concerning how the companies would be managed that is not consistent with the Corporation Act. Since this oral management agreement is inconsistent with the Corporation Act, the plain language of UTAH CODE ANN. § 16-10a-732[3] dictates that it is invalid because it is not in writing. The language of § 732 is clear and unambiguous, and the court need not resort to secondary sources to construe the statute. In any event, even if secondary sources are considered, the official commentary to the statute supports the position that oral shareholder agreements inconsistent with the Corporation Act are invalid.

1. The Alleged Shareholder Agreement is Not Consistent with the Corporation Act.

The Corporation Act outlines how corporations are created and managed. The Act provides that shareholders elect directors, and directors, not shareholders, manage corporations. Section 801 of the Act provides as follows:

> (1) Except as provided in Section 16-10a-732, each corporation must have a board of directors.
> (2) All corporate power shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitations set forth in the articles of incorporation or in an agreement authorized under Section 16-10a-732.

UTAH CODE ANN. § 16-10a-801.

The Corporation Act includes a comprehensive mechanism that outlines how directors are appointed. It provides that directors' terms expire at annual shareholder

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[3] In the trial court, the parties and the court addressed issues concerning the retroactive application of UTAH CODE ANN. § 16-10a-732. The Estate has not addressed this issue in its opening brief, and thereby has waived any argument with respect to this issue. *Spencer v. Pleasant View City*, 80 P.3d 546, 500 n. 5 (Utah Ct. App. 2003).

meetings. UTAH CODE ANN. § 16-10a-805. Shareholders are also entitled to participate in elections for directors. Section 728 of the Corporation Act provides that in electing directors, each shareholder is entitled to one vote for each share and "has the right to cast . . . all of the votes to which the shareholder's shares are entitled for as many persons as there are directors to be elected and for whose election the shareholder has the right to vote." UTAH CODE ANN. § 16-10a-728(1). In addition, the Act provides that "directors are elected by a plurality of the votes cast by the shares entitled to vote in the election." *Id.*

The Act also addresses how director seats are filled in the event a vacancy occurs before an annual meeting at which directors are elected. The Act provides that the board of directors may fill the vacancy. UTAH CODE ANN. § 16-10a-810(1)(b). The Act also addresses what would happen in the event directors are not elected at annual meetings, stating that a director appointed prior to the meeting "continues to serve until the election and qualification of a successor." *Id.* at § 16-10a-805(5).

Thus, ownership of shares gives shareholders the right to participate in elections for directors, but not necessarily the right to participate in managing a company. Management is exclusively within the power of directors, and ownership of shares does not assure appointment to the board. Therefore, as the Estate concedes, the shareholder agreement alleged in the complaint is not consistent with the Corporation Act.

2. Because the Alleged Shareholder Agreement is Not Consistent with the Corporation Act, the Mandatory Language of §§ 732 and 801 Dictates that the Agreement is Invalid Because it is Not in Writing.

As noted above, § 801 of the Corporation Act mandates that all corporations "***must*** have a board of directors" and "[a]ll corporate powers ***shall*** be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . ." UTAH CODE ANN. § 16-10a-801 (emphasis added). Section 801 also states that "an agreement authorized under Section 16-10a-732" may create an exception to the ordinary rule of management by the board of directors. *Id.*

Section 732 of the Corporation Act outlines how shareholders may establish a structure for corporate management that is different from what is outlined in § 801. Subsection one of § 732 states that

> (1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter . . .

UTAH CODE ANN. § 16-10a-732(1). Subsection one of § 732 then outlines, by illustration, the types of agreements that may be the subject of a valid shareholder agreement. Subsection one, for example, authorizes agreements that eliminate the board of directors or restrict its powers. It also authorizes agreements that establish different procedures for selecting directors and establishing their terms of service. Notably, § 732 applies to agreements that are "inconsistent" with the Corporation Act. In other words, § 732 is broad and its applicability is not limited to those circumstances where a shareholder agreement is not only inconsistent but also invalid and unenforceable due to the inconsistency.

Subsection two of § 732 establishes formal requirements for putting in place a shareholders' agreement that is inconsistent with the statutory requirement that corporations "must" have a board of directors and directors "shall" manage all affairs of corporations. Subsection two states as follows:

> (2) An agreement authorized by this section shall be:
> (a) set forth:
> (i) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or
> (ii) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;
> (b) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and
> (c) valid for 10 years, unless the agreement provides otherwise.

UTAH CODE ANN. § 16-10a-732(2). Notably, similar to § 801, this subsection uses the mandatory phrase "shall" in describing the legislature's intent.

Despite § 732's mandate that shareholder agreements by in writing, the Estate argues that § 732 of the Corporation Act does not invalidate the alleged oral management agreement described in the complaint. The Estate contends that § 732 merely validates agreements that comply with § 732's provisions, but does not, on the other hand, invalidate agreements that fail to comply with § 732. The Estate argues that the intent of the statutory provisions is merely to validate written agreements, and leaves open the question of whether oral agreements are valid. The estate contends that the validity of oral agreements "depends on their terms and other contractual formalities and the performance of the shareholders in response thereto." (Appellant's Brief, p. 14.) This assertion is contrary to the clear language of the Corporation Act.

In construing a statute, a court is required to apply the plain language of the statute. A court is required to "presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *Nelson v. Salt Lake County*, 905 P.2d 872, 875 (Utah 1995). When the language employed by the legislature "is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." *Id.* (quoting *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1020 (Utah 1995)). The court will examine secondary sources such as statutory history and relevant policy considerations only if the statute is ambiguous. *Id.*

In the present case, the language of the relevant statutory provisions is plain and unambiguous. The statutory provisions provide that shareholders have the right to elect directors, but not to manage corporations. *See* UTAH CODE ANN. § 16-10a-728. The provisions further provide that a corporation "***must*** have a board of directors" and that "all corporate powers ***shall*** be exercised by the board." *Id.* at § 801 (emphasis added). Although the Corporation Act authorizes an exception to this ordinary mandate for board governance, the Corporation Act dictates that such a shareholder agreement "***shall***" be in writing. *Id.* at § 732 (emphasis added).

The legislature's use of the mandatory words "shall" and "must" cannot be ignored. The word "shall," as used in the statute, is "usually presumed mandatory and has been interpreted as such previously in this and other jurisdictions." *Pugh v. Draper City*, 114 P.3d 546, ¶ 13 (Utah 2005). Similarly, the word "must" when used in statutes has been given a mandatory interpretation. *Provo City v. Hanson*, 601 P.2d 141, 143

(Utah 1979). As one court noted, "where a statute uses the mandatory language 'shall,' a court must obey the statute and has no right to make the law contrary to what the legislature prescribed." *Merrill v. Jansma,* 86 P.3d 270, 288 (Wyo. 2004).

Courts strictly apply statutes that employ mandatory language. For example, in *Pugh v. Draper,* 114 P.3d 546 (Utah 2005), the court construed statutory provisions requiring candidates for municipal elections to file financial disclosures. The statutory provisions construed by the court required that city recorders "shall" remove from ballots the names of candidates that failed to file the appropriate disclosures. Noting the legislature's use of the mandatory word "shall," the court upheld the city recorders' actions in removing the candidate's name from the ballot due to failure to comply with the statutory requirement. *Id.* at ¶¶ 12-13.

Courts have applied a similar method of strict construction in the context of corporate statutes and contracts. In *Farr v. Brikerhoff,* 829 P.2d 117 (Utah Ct. App. 1992), the court considered statutory provisions governing the sale of corporate assets. The relevant statutory provisions required that before completing a sale of substantially all of a corporation's assets, 1) the board "shall" adopt a resolution recommending the sale; 2) written notice "shall" be given to shareholders; and 3) a majority of the shareholders "shall" vote in favor of the sale. *Id.* p. 121. The court of appeals concluded that a purported sale of corporate assets was invalid because it failed to comply with the statute.

In short, mandatory statutory language is ordinarily strictly applied and usually requires the invalidation of actions or contracts that are inconsistent with the statute. *See*

Patterson v. Alpine City, 663 P.2d 95, 96 (Utah 1983) (municipal sewer connection fee invalid because statutory requirement that "all resolutions *shall* be in writing is mandatory") (emphasis in original); *Davis v. Heath Development Co.,* 558 P.2d 594, 596 (Utah 1976) (corporate contract that was not approved as required by statute was invalid); *Parr v. Stubbs,* 117 P.3d 1079 (Utah Ct. App. 2005) (ordering dismissal of lien nullification proceeding because of plaintiff's failure to comply with mandatory requirements of statute).

The Estate misses the mark when it argues that § 732 merely validates written shareholder agreements but does not invalidate oral shareholder agreements. The Estate concedes, as it must, that the alleged shareholder agreement does not comply with the various statutory provisions that outline how corporations are governed. At pages 18 and 19 of its opening brief, the Estate asserts that the shareholder agreements "conflict with a number of the sections of the Revised Act." As noted above, the alleged agreement providing that Gary and Dale, as shareholders, would manage the corporations is not consistent with the statutory mandate that corporations "must" have a board of directors and "shall" be managed by the board. The legislature chose to carve out an exception through § 732 whereby shareholders could agree to alternative management structures. However, without the exception in § 732, any shareholder agreement, whether written or oral, providing for a form of corporate governance that is contrary to the Corporation Act would be suspect and subject to challenge. Clearly, the legislature intended that shareholder agreements with alternative management arrangements would only be valid if they comply with § 732. Absent an agreement that conforms to § 732, a corporation

has no choice but to comply with the mandate that it "must" have a board of directors and the board "shall" manage the company. Any such agreement purporting to establish a management structure contrary to the Corporation Act is presumptively invalid, and must look to § 732 for validation.

The trial court's interpretation of § 732 is consistent with well-established principles of statutory construction. This Court has endorsed, as an aid to statutory interpretation, the principle of "expressio unius est exclusio alterius." *Monson v. Carver*, 928 P.2d 1017, 1024 (Utah 1996). This phrase means "the expression of one thing is the exclusion of another." *Id.* at 1025 (quoting BLACK'S LAW DICTIONARY 581 (6th Ed. 1990)). This Court has stated that this principle will apply if "in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the statute." *Id.* (quoting *Cullum v. Farmers Ins. Exch.*, 857 P.2d 922, 924 (Utah 1993)). Applying this principle, courts have held that "if a statute specifies under what conditions it is effective, we can ordinarily infer that it excludes all others." *Pam Transport v. Freightliner Corp.,* 893 P.2d 1295 (Ariz. 1995). *See also Rectenwald v. Snider,* 894 P.2d 1242, 1244 (Ore. Ct. App. 1995), rev. denied 907 P.2d 247 ("When a statute limits something to be done in a particular form, it necessarily implies in itself a negative, i.e., that the thing shall not be done otherwise.")

In the present case, the legislature expressly mandates a form for corporate governance that requires that a board of directors manage corporations. The legislature has also provided for an exception to the ordinary manner of corporate governance only

through an agreement that complies with § 732. Section 732 dictates that such an agreement "shall" be in writing. By expressly outlining a form for corporate governance and a specific process for deviating from that form, the legislature quite clearly excluded the validity of agreements that fail to comply with § 732.

The Corporate Defendants' interpretation of § 732 is consistent with the interpretation given a similar statute by the Maine Supreme Court in *Villar v. Kernan*, 695 A.2d 1221 (Me. 1997). In *Villar*, the court held that an oral shareholder agreement was invalid, noting that the agreement "must meet the [statute's] specifications and therefore must be in writing to be enforceable." *Id.* at 1224.

In construing statutes, courts have a "duty to avoid interpreting a statute in a manner that renders portions of the statute, or related statutes, meaningless." *Lyon v. Burton,* 5 P.3d 616, ¶ 19 n. 5 (Utah 1996). In the present case, the legislature has mandated a form of corporate governance, subject only to the exception found in § 732. Section 732 mandates that any shareholder agreement changing the form of corporate governance "shall" be in writing. If the court were to adopt the Estate's interpretation of § 732, the statutory requirement for written shareholder agreements would be meaningless. If the Estate's position were to be adopted, an oral agreement would be just as valid as a written agreement, and the requirement in § 732(2) for a written document would be pointless.

3. The Court Should Not by Judicial Decision Create an Equitable Exception to § 732's Mandatory Requirements.

The Estate appears also to argue that the Court should overlook the mandatory language of § 732 because the alleged shareholder agreement was partly performed, and it would be inequitable not to enforce the agreement. This assertion has no factual basis in the allegations of the Complaint. At issue is the right of Gary's heirs to participate in management. The Complaint does not even allege that Dale and Gary reached an agreement whereby their heirs would manage the companies after either's death. Similarly, the Complaint doesn't allege that such an agreement was partly reformed.

In any event, § 732 does not include a part performance exception. Obviously, the legislature knows how to create a part performance exception because it has done so in the Statute of Frauds. *See* UTAH CODE ANN. § 25-5-8 (remedy of specific performance is available with respect to an agreement otherwise barred by the statute of frauds if the agreement was partly performed).

The Court should not by judicial action effectively amend the statute to include a part performance exception because courts lack power to ignore mandatory statutory requirements based upon equitable considerations. *Warner v. Sirstins,* 838 P.2d 666, 670 (Utah 1992) (court "does not have the authority to ignore existing principles of law in favor of its view of the equities."); *see also Stroud v. Stroud,* 738 P.2d 649, 650 (Utah Ct. App. 1987), aff'd 758 P.2d 905 (Utah 1988) (mandatory requirement for interest on judgment could not be ignored on equitable grounds because "when principles of equity confront rules of law, 'equity follows the law.'") (quoting *McDermott v. McDermott,* 628 P.2d 959, 960 (Ariz. Ct. App. 1981).

4. ***The Official Commentary to § 732 Need Not Be Considered Because the Statute is Unambiguous, but Even if Considered, it Supports the Trial Court's Dismissal of the Complaint.***

The Estate argues that § 732 is ambiguous and the Court should look to the official commentary in order to construe the statute. This argument is in error, as set forth above. Accordingly, the Court should apply the plain language of the statute and it is unnecessary for the Court to even consider the official commentary. In any event, even if considered, neither the official commentary nor policy considerations support the Estate's interpretation of the statute.

Section 732(1) outlines, by illustration, the subject matter of potential agreements that § 732 validates. Section 732(2) then outlines the formal requirements for such an agreement. The official commentary, in discussing § 732(1), states that the definition of potential subjects for agreements, as outlined in Subsection 1, is illustrative only, and not exclusive, stating:

> Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of subsection 732(1) is, ipso facto, a type of agreement that is not valid unless it complies with Section 732. Section 732(1) also contains a "catch-all" which adds a measure of flexibility to the seven enumerated categories.

(Official Commentary, p. 338, attached as Addendum 4). The Estate reads the above-referenced portion of the commentary to mean that an agreement is not necessarily invalid because of failure to comply with the requirements of § 732(2), including the requirement that an agreement be in writing. However, there is no reference to the

specific requirements of Subsection 2 in this portion of the commentary. This portion of the commentary does not at all state that oral agreements are valid under § 732. Rather, this section of the commentary only states that the permissible range of subjects as outlined in § 732(1) is not exclusive, and other kinds of agreements not expressly described in § 732(1) may also be validated by the statute, even though not specifically referenced in subsection one. In short, this portion of the commentary only addresses the potential subjects which a shareholder agreement may address. It does not address the formal requirements for a shareholder agreement as outlined in subsection two or the result of failure to comply with those requirements.

The Estate's argument is also inconsistent with other portions of the official commentary. The official commentary provides that § 732 "adds an important element of predictability previously absent from the Model Act and affords participants in closely held corporations greater contractual freedom to tailor the rules of their enterprise." *Id.* at p. 338. The commentary further states that its purpose is to add "legal certainty" to certain types of shareholder agreements. *Id.* The official commentary further provides that the section "minimizes the formal requirements for a shareholder agreement" and states that "the principal requirements are simply that the agreement be in writing and be approved or agreed to by all persons who are shareholders." *Id.* at p. 339. The commentary notes that a written agreement signed by all shareholders is desirable, even if the agreement is contained in the company's bylaws, because it would "establish unequivocally" the agreement. *Id.*

It is apparent from the commentary that the purpose of § 732 is twofold: (1) to allow shareholders in closely held corporations greater contractual freedom as to how their enterprise will be governed; and (2) to increase predictability and legal certainty concerning shareholder relationships and the governance of closely held corporations. To carry out these purposes, the official commentary states that § 732 includes minimal formal requirements, but those formal requirements do include that the agreement be in writing.

The Estate's construction of § 732 is contrary to the statute's stated purpose of obtaining predictability and legal certainty through a written agreement approved by all shareholders. Contrary to the intent of the statute as outlined in the commentary, the Estate would have the trial court examine years of interaction between the shareholders in an attempt to infer a shareholders agreement based upon "custom, usage, and course of dealing." (Complaint, ¶ 27, ROA p. 7.) Resolving the issues raised in the complaint under the standard urged by the Estate will require extended, complicated legal proceedings.

If the Estate were successful in obtaining the relief it requests in the complaint, the confusion and uncertainty would increase. Even as alleged by the Estate in the complaint, the terms of the alleged shareholder agreement are indefinite and unwieldy. This is plainly evident from the relief requested. In the complaint, the Estate requests an order requiring that "Plaintiff and Plaintiff's successors and assigns . . . be involved in the formulation and implementation of policies for the conducting of the business of [the companies]" and further requiring that the companies "neither adopt or implement

policies or conduct business of the companies to which Plaintiff or his successors and assigns are not in agreement." (*Id.* ¶ 59(a), ROA pp. 18-19.) In short, the Estate requests that Dale and the heirs of Gary become involuntary partners in the management of the businesses. This will result in a morass of confusion and contention concerning what business decisions require the Estate's consent.

The result urged by the Estate is very different from the predictable written agreement contemplated by § 732, and is contrary to the goal of "legal certainty" envisioned by the commentary.

B. UTAH CODE ANN. § 16-10a-732 REQUIRES THAT A SHAREHOLDER AGREEMENT PROVIDING FOR MANAGEMENT OF A CORPORATION IN A MANNER INCONSISTENT WITH THE CORPORATION ACT EXPIRES AFTER TEN YEARS WHEN THE TERM AGREED UPON BY THE PARTIES IN THE ALLEGED AGREEMENT IS INDEFINITE.

The trial court concluded, as a matter of law, that even if there were an enforceable shareholders agreement along the lines argued by the Estate, it could not endure beyond ten years pursuant to § 732(2). Section 732(2) provides that shareholder agreements are "valid for ten years, unless the agreement provides otherwise." UTAH CODE ANN. § 16-10a-732(2)(c). The Estate argues that this provision has no application, asserting that

> there was no factual basis from which the trial court could properly conclude that Gary Ostler and Dale Ostler had not agreed that the terms of their agreements would extend for so long as each owned 50% of the capital shares of the companies, both intending and understanding that term may extend in excess of ten years.

(Appellant's Brief, p. 24.) The Estate, however, can cite no allegation in the Complaint which alleges that Gary and Dale Ostler agreed that the alleged shareholder agreement

would extend beyond ten years. Rather, the allegations in the Complaint, at best, allege an agreement with an undefined term. The Estate appears to argue that the ten year default term in § 732 does not apply because Gary and Dale agreed that the term of their agreement would extend indefinitely. In other words, the Estate argues that § 732's condition of "unless the agreement provides otherwise" is satisfied because Gary and Dale's agreement allegedly included an indefinite term. This interpretation of the statute is contrary to its clear language.

Section 732 contemplates that shareholders (in a written agreement) may define the duration of their agreement. In the event the shareholders do not do so, § 732 imposes by default a term of ten years. Since, as the Estate concedes, Gary and Dale did not define the duration of the agreement, § 732's default term applies.

The Estate attempts to turn the agreement into a perpetual, unending agreement because Gary and Dale did not define a specific term for the alleged agreement. However, that is not how the law treats agreements for which the parties do not define a term. Contracts that do not specify a duration are "generally presumed to be terminable at will." *Uintah Basin Medical Center v. Hardy*, 54 P.3d 1165, ¶ 21 (Utah 2002); *see also Midwest Energy Consultants v. Covenant Home*, 815 N.E.2d 911, 915 (Ill. Ct. App. 2004) (consulting agreement of indefinite duration terminable at will); *Santa Fe Custom Shutters and Doors, Inc. v. Home Depot USA*, 113 P.3d 347, 358 (N.M. Ct. App. 2005), cert. denied 113 P.3d 345 (N.M. 2005) (holding under UCC that contract of indefinite

duration is terminable at will).[4] If the statutory term of ten years does not apply, either Gary or Dale would be free to terminate the agreement at any time. If the agreement were transferable, then successors to Gary and Dale would have the same right.

C. AN ALLEGED SHAREHOLDER AGREEMENT PROVIDING FOR THE MANAGEMENT OF A CORPORATION IN A MANNER INCONSISTENT WITH THE CORPORATION ACT IS NOT INHERITABLE WHEN THE AGREEMENT WOULD REQUIRE A PERSONAL RELATIONSHIP AMONG SHAREHOLDERS IN MANAGING THE CORPORATION, INCLUDING ESTABLISHING AND IMPLEMENTING ALL COMPANY POLICIES AND PROGRAMS, DEVELOPING BUSINESS VENTURES, AND MAKING DECISIONS CONCERNING THE USE OF PROFITS.

The Complaint assumes, as a matter of law, that the Estate, as the successor in interest to Gary's stock, is entitled to enforce the alleged shareholder agreement. The Complaint does not allege that Gary and Dale agreed that after their death their heirs would be subject to the same agreement. Rather, the Complaint presumes that the shareholder agreement is inheritable as a matter of law. This assumption, however, is in error.

> It is well established that not every right is assignable or inheritable.
>
> [R]ights or interests which are personal to the deceased are not inheritable and ordinarily are not subject to descent and distribution. Such rights include a personal right to use land, a personal power of appointment, personal option, a statutory right to contest a will, a grantor's right to take advantage of the breach of a condition subsequent in a deed, a tenancy at will, or an estate for life.

26B CJS Descent and Distribution § 9 (2001). The Estate can cite no case law providing that the authority and fiduciary duty ordinarily conferred upon directors to manage

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[4] Although not controlling, the Utah Uniform Commercial Code is persuasive by analogy. It provides "where the contract provides for successive performances but is indefinite in

corporations may be assigned or inherited. Indeed, the fiduciary duties imposed upon directors are "non-delegable." *Auerbach v Bennett,* 419 N.Y.S.2d 920, 928 (N.Y. 1979).

Utah law recognizes that not all rights are assignable or inheritable. For example, this Court has held that a professional degree is "highly personal" and "terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, or conveyed, or pledged." *Martinez v. Martinez,* 818 P.2d 538, 541 (Utah 1991) (quoting *In re Marriage of Graham,* 574 P.2d 75, 77 (Utah 1978)). Utah case law has found that in some circumstances the rights created by contract are personal in nature and cannot be transferred. For example, in *Maw v. Weber Basin Water Conservancy District*, 436 P.2d 230 (Utah 1968), the court held that a contract which granted hunting privileges to designated individuals was limited to the specified individuals and could not be assigned or inherited.

Contracts are not assignable when "they involve a matter of personal trust or confidence or are for personal services." *Scott v. Fix Brothers Enterprises, Inc.*, 667 P.2d 773 (Col. Ct. App. 1983). Utah law has followed this principle, holding that "a contract which is personal in nature, where the personal needs, characteristics or personality of the obligee are dominant factors in the reason for contracting, is not assignable." *Clark v. Shelton*, 584 P.2d 875, 877 (Utah 1978).

It is apparent from the face of the Complaint that the contract alleged by the Estate, if it existed, was highly personal in nature, and not assignable. Gary and Dale

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duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party." UTAH CODE ANN. § 70A-2-309.

were brothers. They each were shareholders in the companies and, according to the Complaint, agreed to operate the companies informally as partners, with neither business doing anything without the consent of both Gary and Dale. This quite obviously was a relationship of personal trust and confidence, where the personal traits and characteristics of each were dominant factors in the relationship. The right to manage the corporations ought not to transfer to their heirs as a matter of law.

Closely-held corporations sometimes operate more like a partnership, without compliance with all of the formalities that usually apply to corporations. *See Roos v. Aloi,* 487 N.Y.S. 2d 637, 640 (N.Y. Gen. Term 1985) (in the case of closely held corporations, "certain formalities may be waived" and the court may "treat the shareholders as copartners"). The purpose of § 732 is to provide a mechanism whereby shareholders of a closely-held corporation can adapt the enterprise to meet their needs, without complying with the management structure ordinarily applicable to corporations. Section 732(6) expressly authorizes a shareholder agreement that "treats a corporation as if it were a partnership." UTAH CODE ANN. § 16-10a-732(6). Given the nature of closely-held corporations, Utah partnership law, although not controlling, is persuasive by analogy with respect to the issue of whether management rights can be assigned and inherited.

Utah statutory provisions provide that a partner may assign his interest in a partnership unless an agreement provides otherwise, and the assignment permits the assignee to receive the partnership profits to which the assigning partner would be entitled. However, the Act further specifies that the assignment does not "entitle the

assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs." UTAH CODE ANN. § 48-1-24. The Act further provides that an assignment of a partnership interest merely allows the assignee to receive profits to which the assigning partner otherwise would have been entitled. *Id.* Furthermore, Utah partnership law provides that upon the death of a partner, the heirs of the deceased partner do not step into the shoes of the deceased to continue operating the business. Rather, the death of a partner results in the dissolution of the partnership. UTAH CODE ANN. § 48-1-28(4). Utah partnership law adopts the common sense notion that the personal relationships inherently required in the management of a business should not be involuntarily imposed upon anyone.

The position urged by the Estate would lead to an absurd, impracticable result. If the position urged by the Estate is accepted, it would mean that the heirs of Gary and Dale, as owners of the stock, are forever bound by an agreement that requires a personal relationship among them in the management of the companies. If the Estate's position is adopted, this agreement of indefinite duration could never be terminated, and Gary's and Dale's heirs would forever be involuntarily compelled to act as partners in managing the companies. Not only does the law not require this result, it is difficult to imagine that either Gary or Dale contemplated such an arrangement. Indeed, the Complaint fails even to allege that Gary and Dale contemplated that the shareholder agreement described in the complaint would extend beyond the death of either. Stability and competent management is necessary for the continued success of any company. The Estate's

position could place these important goals in jeopardy, and will undoubtedly result in contention and uncertainty in the companies' management structure.

D. THE TRIAL COURT PROPERLY DISMISSED THE ESTATE'S CLAIMS BECAUSE THE ESTATE CONCEDES THAT ALL CLAIMS FOR DAMAGES ARE BARRED BY UTAH CODE ANN. § 25-5-4(1) AND THE EQUITABLE REMEDY OF SPECIFIC PERFORMANCE IS NOT AVAILABLE TO COMPEL PARTIES TO ENGAGE IN A PERSONAL RELATIONSHIP OF TRUST IN MANAGING AND OPERATING A BUSINESS.

In the trial court, the Estate conceded that any claim it may have asserted for damages is barred by the statute of frauds as set out in UTAH CODE ANN. § 25-5-4(1). This statutory provision provides that an agreement not to be performed within one year is void unless it is in writing. In the trial court, the Estate conceded the applicability of § 25-5-4(1), stating "the agreements do fall within the purview of Section 25-5-4(1)." (Plaintiff's Memorandum in Opposition to the Ostler International and Ostler Property Development Motion to Dismiss, p. 14, ROA p. 157). The Estate has argued, however, that to the extent its claims seek specific performance of the shareholder agreement, the claims survive because the agreement was partly performed. The Estate relied upon UTAH CODE ANN. § 25-5-8 to make this argument, which states:

> Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

This argument fails because, as noted above, the legislature did not include a part performance exception to the mandatory requirements of UTAH CODE ANN. § 16-10a-732(2). In addition, this argument fails because courts will not specifically enforce agreements involving personal relationships.

It should first be noted that the trial court correctly dismissed Plaintiff's claims to the extent they seek to recover damages. The saving clause found in § 25-5-8 only preserves claims for specific performance based upon the part performance doctrine. The Estate makes no argument that any claim for damages somehow survives, and there is no legal authority to support such a position. Accordingly, the trial court properly dismissed all of Plaintiff's claims to the extent the claims seek to recover damages.

In addition, the Estate's claims fail because it is clear from the face of the Complaint that specific performance is not possible as a remedy in this case. The Estate seeks a court order that would require that Gary's heirs and Dale Ostler work together as partners in managing the business of the Corporate Defendants. The Estate seeks an order requiring that the Estate's consent is necessary before the Corporate Defendants can implement any business policy or practice and that the Estate must be permitted to participate in the management of the business. The order which the Estate seeks extends far beyond the Estate and Dale Ostler. The Estate apparently would have this Court order that the heirs or successors to Dale and Gary are perpetually bound by the alleged verbal agreement that the owners of the stock would operate the businesses as partners, with no major decisions being made without the consent of all the stockholders. In short, the Estate seeks an order compelling personal relationships among both present and future shareholders, as well as an order compelling those shareholders to render personal services to the companies pursuant to an alleged verbal agreement between Dale and Gary. Courts, however, cannot properly order parties to work together in such a fashion, nor should any court enter such any order that undoubtedly would require ongoing

judicial intervention and supervision of these companies' business practices for years to come.

The restatement provides as follows:

> (1) A promise to render personal service will not be specifically enforced.
>
> (2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable....

RESTATEMENT (SECOND) OF CONTRACTS § 367 (1979). Following this principle, courts have declined to order specific performance of partnership agreements, even if there is a breach of the agreement.

> [t]he relationship of partners is one of agency. It is so personal in nature that equity will not enforce the continuation of a partnership when one partner elects to terminate it, even though termination would be contrary to the partnership agreement.

Logan v. Logan, 675 P.2d 1242, 1249 (Wash. Ct. App. 1984).

Courts also decline to enter orders of specific performance when to do so would impose a difficult burden of ongoing supervision on the court. The restatement provides as follows:

> A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

RESTATEMENT (SECOND) OF CONTRACTS § 366 (1979). Following this principle, courts have concluded that "[n]o affirmative equitable relief is better than problematic equitable relief," and "[e]quitable remedies are a special blend of what is necessary, what is fair,

and what is workable." *Entergy Arkansas, Inc. v. Entergy Louisiana, Inc.*, 226 F. Supp. 2d 1047, 1160 (D. Neb. 2002) (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973)), aff'd 358 F.3d 688 (8th Cir. 2004).

If the Court were to grant an order of specific performance along the lines requested by Plaintiff, the Court would bear the burden of continued supervision and interpretation concerning the relationship of reluctant, unwilling partners in a partnership that will have no end. It is simply not fair to coerce the parties into a relationship of such personal trust. Undoubtedly any order compelling an ongoing partnership will lead to further disputes and continued resort to court intervention. This is an inappropriate burden to place on the trial court and it is not fair to the parties.

VII. CONCLUSION

For the reasons set forth above, the Court should affirm the trial court's dismissal of the complaint.

DATED this 21st day of November, 2005.

KRUSE LANDA MAYCOCK & RICKS, LLC

Steven G. Loosle
Attorneys for Ostler International, Inc. and Ostler Property Development, Inc.

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing BRIEF OF APPELLEES OSTLER INTERNATIONAL, INC. AND OSTLER PROPERTY DEVELOPMENT, INC. has been mailed, postage fully prepaid, this 21st day of November, 2005, to the following:

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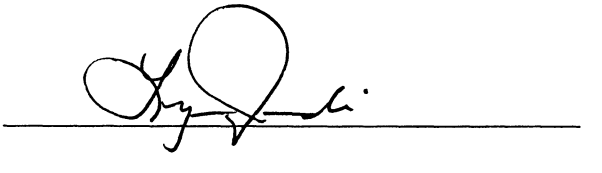

Tab 1

16-10a-728. Voting for directors - Cumulative voting.

(1) At each election of directors, unless otherwise provided in the articles of incorporation or this chapter, every shareholder entitled to vote at the election has the right to cast, in person or by proxy, all of the votes to which the shareholder's shares are entitled for as many persons as there are directors to be elected and for whose election the shareholder has the right to vote.

(2) Unless otherwise provided in the articles of incorporation or this chapter, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election, at a meeting of shareholders at which a quorum is present.

(3) Shareholders do not have a right to cumulate their votes for the election of directors unless the articles of incorporation so provide.

(4) A statement included in the articles of incorporation to the effect that all or a designated voting group of shareholders are entitled to cumulate their votes for directors, means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(5) Shares entitled to vote cumulatively may be voted cumulatively at each election of directors unless the articles of incorporation provide alternative procedures for the exercise of the cumulative voting rights.

History: C. 1953, 16-10a-728, enacted by L. 1992, ch. 277, § 75.

16-10a-732. Shareholder agreements.

(1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter in that it:

(a) eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in Section 16-10a-640;

(c) establishes who shall be directors or officers of the corporation, or their terms of office or

manner of selection or removal;

(d) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(e) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(f) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(g) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(h) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(2) An agreement authorized by this section shall be:

(a) set forth:

(i) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or

(ii) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(b) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

(c) valid for 10 years, unless the agreement provides otherwise.

(3) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by Section 16-10a-626(2). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement does not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement is entitled to rescission of the purchase. A purchaser is considered to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with

this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within the earlier of ninety days after discovery of the existence of the agreement or two years after the time of purchase of the shares.

(4) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

(5) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom the discretion or powers are vested, liability for acts or omissions imposed by laws on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(6) The existence or performance of an agreement authorized by this section may not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(7) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

History: C. 1953, 16-10a-732, enacted by L. 1992, ch. 277, § 78.

16-10a-801. Requirement for and duties of board of directors.

(1) Except as provided in Section 16-10a-732, each corporation must have a board of directors.

(2) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under Section 16-10a-732.

History: C. 1953, 16-10a-801, enacted by L. 1992, ch. 277, § 80.

16-10a-805. Terms of directors generally.

(1) Except as provided in Section 16-10a-806, the terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(2) Except as provided in Section 16-10a-806, the terms of all other directors expire at the next annual shareholders' meeting following their election.

(3) A decrease in the number of directors does not shorten an incumbent director's term.

(4) (a) A director elected to fill a vacancy created other than by an increase in the number of directors shall be elected for the unexpired term of the director's predecessor in office, or for any lesser period as may be prescribed by the board of directors.

(b) If a director is elected to fill a vacancy created by reason of an increase in the number of directors, then the term of the director so elected expires at the next shareholders' meeting at which directors are elected, unless the vacancy is filled by a vote of the shareholders, in which case the term shall expire on the later of:

(i) the next meeting of shareholders at which directors are elected; or

(ii) the term designated for the director at the time of the creation of the position being filled.

(5) Despite the expiration of a director's term, the director continues to serve until the election and qualification of a successor or until there is a decrease in the number of directors.

(6) A director whose term has ended may deliver to the division for filing a statement to that effect pursuant to Section 16-10a-1608.

History: C. 1953, 16-10a-805, enacted by L. 1992, ch. 277, § 84.

16-10a-810. Vacancy on board.

(1) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) the shareholders may fill the vacancy;

(b) the board of directors may fill the vacancy; or

(c) if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Unless otherwise provided in the articles of incorporation, if the vacant office was held or is to be held by a director elected by a voting group of shareholders:

(a) if one or more of the other directors elected by the same voting group are serving, only they are entitled to vote to fill the vacancy if it is filled by the directors; and

(b) only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders.

(3) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under Section 16-10a-807 or otherwise, may be filled before the vacancy occurs, but the new director may not take office until the vacancy occurs.

History: C. 1953, 16-10a-810, enacted by L. 1992, ch. 277, § 89; 1993, ch. 184, § 2.

25-5-4. Certain agreements void unless written and signed.

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(b) every promise to answer for the debt, default, or miscarriage of another;

(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

(e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and

(f) every credit agreement.

(2) (a) As used in Subsection (1)(f) and this Subsection (2):

(i) (A) "Credit agreement" means an agreement by a financial institution to:

(I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action;

(II) otherwise extend credit; or

(III) make any other financial accommodation.

(B) "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means:

(A) a state or federally chartered:

(I) bank;

(II) savings and loan association;

(III) savings bank;

(IV) industrial bank; or

(V) credit union; or

(B) any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b) (i) Except as provided in Subsection (2)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement:

(A) is in writing;

(B) expresses consideration;

(C) sets forth the relevant terms and conditions; and

(D) is signed by the party against whom enforcement of the agreement would be sought.

(ii) For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (2)(b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

(i) the debtor is provided with a written copy of the terms of the agreement;

(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and

(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

History: R.S. 1898 & C.L. 1907, § 2467; L. 1909, ch. 72, § 1; C.L. 1917, § 5817; R.S. 1933 & C. 1943, 33-5-4; L. 1989, ch. 257, § 1; 1996, ch. 182, § 24; 2004, ch. 92, § 24.

25-5-8. Right to specific performance not affected.

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

History: R.S. 1898 & C.L. 1907, § 2477; C.L. 1917, § 5824; R.S. 1933 & C. 1943, 33-5-8.

48-1-24. Assignment of partner's interest.

A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, or, as against the other partners in the absence of agreement, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

In case of a dissolution of a partnership, the assignee is entitled to receive his assignor's interest, and may require an account from the date only of the last account agreed to by all the partners.

History: L. 1921, ch. 89, § 27; R.S. 1933 & C. 1943, 69-1-24.

48-1-28. Causes of dissolution.

Dissolution is caused:

(1) Without violation of the agreement between the partners:

(a) By the termination of the definite term or particular undertaking specified in the agreement.

(b) By the express will of any partner when no definite term or particular undertaking is specified.

(c) By the express will of all the partners who have not assigned their interests, or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

(4) By the death of any partner.

(5) By the bankruptcy of any partner or the partnership.

(6) By decree of court under Section 48-1-29.

History: L. 1921, ch. 89, § 31; R.S. 1933 & C. 1943, 69-1-28.

Tab 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS L. STOWELL, et al.	:	**RULING AND ORDER**
Plaintiff,	:	**CASE NO. 040926555**
vs.	:	**June 8, 2005**
OSTLER INTERNATIONAL, et al.	:	
Defendant.	:	

The above matter came before the Court on June 6, 2005 for oral argument on Defendants' motions to dismiss, Plaintiff's Motion to Postpone Decision, and the Ostler Defendants' Motion to Strike, pursuant to Rule 7. Plaintiff was present through Gary A. Weston, the Ostlers were present through Mark A. Larsen, and Ostler International and Ostler Property Development ("the corporations") were present through Steven G. Loosle.

The corporations' Motion to Dismiss, with accompanying memorandum, was filed on January 20, 2005. On January 24, 2005, the Ostlers filed their Motion to Dismiss with an accompanying memorandum and an affidavit. Plaintiff filed his opposition to the corporations' motion on February 15, 2005, and independently filed his opposition to the Ostlers' motion on February 22, 2005. On the same date, Plaintiff filed his Motion to Postpone Decision on the Ostler Motion to Dismiss, with accompanying affidavit. The Ostlers

filed their reply in support of their motion to dismiss on February 28, 2005. On March 3, 2005, the Ostlers filed both their opposition to Plaintiff's motion to postpone and their motion to strike, with accompanying memorandum, and the corporations' reply in support of their motion was also filed on March 3, 2005. Plaintiff's reply in support of his motion to postpone was filed on March 10, 2005 and his opposition to the Ostlers' motion to strike followed on March 17, 2005. The Ostlers filed their reply in support of their motion to strike on March 24, 2005. These motions were submitted for decision on March 29, 2005.

The court scheduled and heard oral argument and took the matter under advisement. Having considered the case file, the motion and the memoranda submitted by the parties, and the arguments made in open court, the Court enters the following decision.

BACKGROUND

Plaintiff Douglas Stowell is the Personal Representative of the Estate of Gary W. Ostler, who, at the time of his death in July 2003, was 50% shareholder in Defendants Ostler International Inc., and Ostler Property Development, Inc., both of which are closely held corporations. At the time Gary Ostler died his brother Defendant Dale Ostler held the other 50% of the shares in both corporations. Both brothers, without the benefit of bylaws or any provisions in the articles of incorporation, and apparently by oral

agreement, served as the board of directors and shared equal decision-making authority for both companies. Shortly after Gary's death, Dale Ostler appointed himself and another brother, Defendant Vyron Ostler, as the new Board of Directors in both companies.

Plaintiff brought this action on behalf of the Estate of Gary Ostler to seek to require the parties to continue to operate under the oral agreement under which the parties operated prior to Gary's death, and specifically to require and enjoin Defendants from taking any action without the consent of Plaintiff, including, but not limited to, appointing a new board of directors.

DISCUSSION

Treatment of Ostlers' Motion as Motion for Summary Judgment

The crux of the arguments in favor of dismissal of this action lies in the simple proposition that because the alleged agreement between Gary and Dale Ostler was not in writing, it cannot be enforced. The affidavit of Dale Ostler, while it may be useful for determining what the terms of such agreement were, is not helpful in determining the legal question of whether any such oral agreement can be enforced under either the Utah Revised Business Corporations Act, or under its predecessor, the Utah Business Corporations Act.

In the court's view, this is a purely legal consideration, and

the facts upon which such a legal determination may be made are contained entirely in the Complaint filed in this matter. Accordingly, because the court does not rely upon the Affidavit of Dale Ostler in reaching its decision, the court hereby excludes such, and determines this matter under Rule 12(b)(6) as the substantive motions filed herein invite.

Consequently, Plaintiff's motion to postpone and the Ostlers' motion to strike, inasmuch as these motions were relevant only if the Ostler Motion was considered as a motion filed under Rule 56, are hereby DENIED as moot.

Defendants' Motions to Dismiss

Because the court considers the present motions as they were presented, and excludes all matters outside the pleading, it is appropriate that the court consider the facts as alleged to be true, indulging all reasonable inferences consistent with the allegations of the complaint.

Enforceability of the Oral Agreement

Plaintiff's nine causes of action seek enforcement of the oral agreement under contract and equitable theories, and those theories include breach of contract (first and second causes of action), constructive trust (third), unjust enrichment (fourth), breach of fiduciary duty (fifth), promissory estoppel (sixth). The complaint

also seek declaratory and injunctive relief and an accounting (seventh-ninth causes of action). At the heart of all of these causes of action are duties which arose as a result of an oral agreement between Dale Ostler and Gary Ostler. While the court assumes the existence of an agreement between the two brothers, the question arises whether the agreement is still in force, which may be determined upon facts as alleged in the complaint.

Applicability of U.C.A. § 16-10A-732

For purposes of this motion, the court accepts Plaintiff's argument that while there were two separate corporations formed, the agreement under which both corporations were managed predates those incorporations, and also predates the Utah Revised Business Corporations Act. However, the act specifically applies itself to those corporations which were in existence at the time it was enacted, as well as those formed afterward, in an attempt to ensure the uniform application of the law to all corporations then in existence. See Utah Code Ann. § 16-10A-1701. Plaintiff has not submitted to the court any basis for application of the saving provisions established under § 1704, which provides a limited basis for the enforcement of the previous act, except for the existence of the agreement prior to enactment of the revised act. Accordingly, the court applies the provisions of the Utah Revised Business Corporations Act to the agreement.

Restriction on Operational Agreements Outside of the Act

Section 732(2) of the act provides:

> (2) An agreement authorized by this section [i.e. one which takes operation of the company outside the act] shall be:
>
> (a) set forth:
>
> (I) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or
>
> (ii) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation; . . .
>
> ©) valid for 10 years, unless the agreement provides otherwise.

Utah Code Ann. § 16-10A-732(2). The words "shall be" constitute mandatory language—in other words, operation within this provision is limited to only those circumstances specified in the provision. Those circumstances are that an agreement formed which allows a corporation to operate outside of the requirements of the Act, "shall be set forth" in the articles of incorporation or bylaws, or in a written agreement. Under both methods, the agreement must be approved by all shareholders.

Furthermore, Plaintiff's argument to the contrary notwithstanding, unless the agreement provides specifically for the agreement to endure beyond ten years, it falls within the default operation of subsection 2©), which is that it "shall be . . . valid for 10 years." Because the corporations were formed in 1988 and

1993, any agreement ceased to be enforceable no later than July 2003, which, coincidentally, was about the time of Gary's death. If the passage of the Act is considered as the relevant time, the agreement ceased to be effective in 1992. Accordingly, the agreement, even if it had been in writing and thus enforceable, would no longer have been in force after Gary's death unless it had provided for a period in excess of ten years. Thus, no action may be maintained on the contract and the Plaintiff's first and second causes of action must be dismissed.

Plaintiff argues that section 732 does not label as "invalid" an agreement that is not in writing. The court disagrees as to the legal effect of the words "shall" be in writing. The court believes that if not in writing, an agreement meant to allow a diversion from the requirements of the Act must be in writing or it is not enforceable.

Equitable Treatment of the Agreement

Notwithstanding the failure of the agreement to survive until the present action accrued, the question remains whether the promises made to Gary Ostler might create an equitable obligation upon Dale Ostler and the corporations which inured to the benefit of Gary's estate. The difficulty with this is that there is no allegation in the complaint from which the court may conclude that the operation of the agreement was intended to benefit any other

persons than Gary and Dale Ostler. Throughout the complaint are statements regarding the intent of Gary and Dale Ostler on how the profits were to be divided and how decisions were to be made and how stock ownership was to be divided, but these only serve to underscore the assumption that those arrangements were made for the benefit of Gary and Dale personally. From the informality of the agreement it may clearly be assumed that these two individuals believed that they did not need to have any formal agreement or document detailing how to run the companies precisely because of the personalities involved. Dale apparently knew he could trust Gary, and vice versa. When Gary died, the value of such an informal arrangement to Dale perished with Gary. In light of these circumstances, it would not be equitable to tie the remaining member of the corporations to Gary's estate, and force him to conduct business as if nothing had happened, especially when there is absolutely no allegation that the parties established this business for anything more than their own personal benefit. The court accordingly concludes that this was a personal agreement between Gary and Dale Ostler. The obligations of Dale Ostler to continue conducting business as had been agreed in years previous was an obligation to Gary alone and ended when Gary died, just as surely as Gary's obligations to Dale cannot be enforced beyond the grave.

CONCLUSION

Because the agreements between Dale and Gary Ostler were not enforceable as a matter of contract law under the Utah Revised Business Corporation Act, and because they were personal agreements not enforceable under principles of equity, Defendants Motions to Dismiss are hereby GRANTED.

This Ruling and Order is the Order of the Court, and no other order is required.

DATED this 8 day of June, 2005.

Judge Bruce Lubeck
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040926555 by the method and on the date specified.

METHOD	NAME
Mail	BRENT R ARMSTRONG ATTORNEY DEF STE 150 BANK ONE TOWER 50 W 300 S SALT LAKE CITY, UT 84101-2006
Mail	MARK A LARSEN ATTORNEY DEF 50 W BROADWAY STE 100 SALT LAKE CITY UT 84101
Mail	STEVEN G LOOSLE ATTORNEY DEF 50 W 300 S 8TH FLR POB 45561 SALT LAKE CITY UT 84145-0561
Mail	GARY A WESTON ATTORNEY PLA 53RD PARK PLAZA 5217 S STATE ST STE 400 SALT LAKE CITY UT 84107

Dated this 7 day of June, 20 05.

Deputy Court Clerk

Tab 3

Gary A. Weston (#3435)
Earl Jay Peck (#2562)
NIELSEN & SENIOR
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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS L. STOWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY W. OSTLER, deceased, Plaintiff, vs. OSTLER INTERNATIONAL, INC., a Utah corporation; OSTLER PROPERTY DEVELOPMENT, INC., a Utah corporation; DALE OSTLER and VYRON OSTLER, Defendants.	**COMPLAINT** Civil No. 040926555 Judge Lubeck (Jury Demanded)

Plaintiff, Douglas L. Stowell, as Personal Representative of the Estate of Gary W. Ostler, deceased, hereby demands trial by jury and complains as follows and against the Defendants Ostler International, Inc., Ostler Property Development, Inc., Dale Ostler and Vyron Ostler.

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Douglas L. Stowell, is Personal Representative of the Estate of Gary Ostler, deceased, having been so appointed by this Court on September 17, 2003, in Probate Case No. 033901263 The decedent, Gary Ostler, ("Decedent") died on July 13, 2003.

2. Decedent, and Defendants Dale Ostler and Vyron Ostler are brothers.

3 Defendant, Ostler International, Inc. ("Ostler International"), is a Utah corporation with its principal place of business in Salt Lake County, Utah.

4. Defendant, Ostler Property Development, Inc. ("Ostler Property Development"), is a Utah corporation with its principal place of business in Salt Lake County, Utah.

5. Dale Ostler and Vyron Ostler are Directors of Ostler International and of Ostler Property Development and are officers of Ostler Property Development Vyron Ostler is an officer of Ostler International

6. This Court has jurisdiction over the claims set forth herein pursuant to § 78-3-4(1), Utah Code Annotated

7 The herein causes of action arise in Salt Lake County, Utah and one or more of the Defendants resides or maintains a principal place of business in Salt Lake County, Utah; wherefore, venue properly lies in this County pursuant to § 78-13-7, Utah Code Annotated.

GENERAL ALLEGATIONS

8. Decedent and Dale Ostler incorporated Ostler International about January 13, 1988 with each issued and holding 50% of all shares of capital stock of the company. Each intended

and represented to the other of them that each would own and control one-half of the equity interest of the company.

9. Decedent and Dale Ostler incorporated Ostler Property Development about July 14, 1993, with each issued and holding 50% of all shares of capital stock of the company Each intended and represented to the other of them that each would own and control one-half of the equity interest of the company.

10. Until Decedent's death, all shares of capital stock of Ostler International and of Ostler Property Development issued and outstanding were held 50% by Decedent and 50% by Dale Ostler.

11. Since Decedent's death, all issued and outstanding shares of capital stock of Ostler International and of Ostler Property Development have been held 50% by Dale Ostler and 50% by Decedent's estate.

12. At all times prior to Decedent's death, Decedent and Dale Ostler were and served as the Directors of Ostler International and of Ostler Property Development

13. On information and belief, Plaintiff alleges that on one or more brief occasions, prior to Decedent's death, and at the request of Decedent and of Dale Ostler, Vyron Ostler was a nominal and non-participating member of the Board of Directors of Ostler International.

14. On information and belief, Plaintiff alleges that on one or more brief occasions, prior to Decedent's death, and at the request of Decedent and of Dale Ostler, Vyron Ostler was a nominal and non-participating member of the Board of Directors of Ostler Property Development.

15. Prior to Decedent's death, Ostler International had historically distributed more than 80% of its net profits to Decedent and Dale Ostler as shareholders of the company. The

distributions were made regularly and approximately quarterly, 50% to Decedent and 50% to Dale Ostler.

16. Pursuant to the annual report filed by Ostler International with the Utah Department of Commerce on or about March 26, 1998, it was represented that Vyron Ostler had been removed as a Director of the company and that the company's Board of Directors consisted of two members. Further, the Annual Report which the company filed with Utah Department of Commerce on November 7, 2003 declared the directors of the company, to be Dale Ostler and Vyron Ostler.

17. Some time after Decedent's death, Dale Ostler appointed Vyron Ostler to be a member of the Board of Directors of Ostler International and of Ostler Property Development. It was Dale Ostler's intention that he and Vyron Ostler constitute the Board of Directors of each company.

18. Vyron Ostler was not a shareholder of either Ostler International or of Ostler Property Development at any time prior to the death of the Decedent.

19. On information and belief, Plaintiff alleges that no bylaws for Ostler International have been enacted or adopted.

20. On information and belief, Plaintiff alleges that no bylaws for Ostler Property Development have been enacted or adopted.

21. All policy and practices for the operation of Ostler International and for the operation of Ostler Property Development, including the conduct of the business of each company and the making of net income distributions to shareholders of each company was formulated and implemented only and solely by Decedent and Dale Ostler as the only shareholders of each

company and with the consent of the other of them. No company policies, programs, business ventures or net income distributions were undertaken without their joint and mutual consent. All decisions and policies of both Ostler International and Ostler Property Development and of the Board of Directors of each company were contingent, conditional and based upon the mutual consent and approval of said shareholders. It was the understanding, agreement and practice of each company's board of directors and each member thereof that the business and affairs of the company should and would be undertaken and managed only in accordance with such mutual consent of the company's shareholders.

22. It was the intention, design and purpose of Decedent and of Dale Ostler that shares of the capital stock of Ostler International and of Ostler Property Development neither should nor would, except upon their mutual consent and agreement as shareholders, be offered or provided to any other person.

23. Pursuant to §§ 75-3-703, 75-3-708, 75-3-710 and 75-3-714, Utah Code Annotated Douglas L. Stowell as Personal Representative of the Decedent's Estate is charged to and does hold all rights and interests held by Decedent at the time of Decedent's death, including all right, title and interest of the Decedent in and to the shares of capital stock of both Ostler International and of Ostler Property Development owned and held by Decedent. Plaintiff holds such ownership, title and interest, in trust, as successor in interest to Decedent and for and in behalf of the creditors and beneficiaries of Decedent's estate.

24. Plaintiff has made demand or does hereby demand that Defendants recognize Plaintiff as entitled to and holding the same right and interest held by Decedent as formulated and implemented by Decedent and Dale Ostler pursuant to their past custom, usage and course of

dealing and as was recognized by the directors and officers of Ostler International and of Ostler Property Development. Plaintiff has demanded or does hereby demand that the business of Ostler International and of Ostler Property Development be conducted only in accordance with the past custom, usage and course of dealing between Decedent and Dale Ostler and that no new policy of either company be adopted or pursued or business conducted without the mutual consent of Plaintiff and Dale Ostler.

25. Defendants have not recognized and performed in accordance with the custom, usage and course of dealing formulated and implemented between Decedent and Dale Ostler. They have failed and refused to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler International and of Ostler Property Development and have failed and refused to require that such policy be formulated and implemented only with the mutual consent of Plaintiff and Dale Ostler. In particular the Defendants:

(a) Have adopted and implemented policies to which Plaintiff is not in agreement.

(b) Have failed to call and conduct a meeting of the Shareholders to afford Plaintiff his right to vote the shares of capital stock of Ostler International and of Ostler Property Development and which he holds as a shareholder of each company.

(c) Have nominated, appointed or elected one or more members of the Board of Directors of Ostler International and of Ostler Property Development

without prior notice to, consulting with and obtaining the agreement of Plaintiff.

(d) Intend to issue additional shares of capital stock of Ostler International and of Ostler Property Development to one or more of the Defendants and to third parties allegedly and purportedly in compensation for services rendered or to be rendered by such persons to Ostler International and to Ostler Property Development. The issuance of such shares will compromise and impair the value of the shares held by Plaintiff and the value of Plaintiff's interest in each company.

(e) Intend to retain in Ostler International and in Ostler Property Development the preponderant part of all net earnings of the company and to disburse only a nominal portion of the amount to which Plaintiff is entitled.

(f) Have failed and refused to make regular distributions of net income of Ostler International and of Ostler Property Development as historically made and as agreed between Decedent and Dale Ostler and in particular, have refused to make such distributions to which Plaintiff is entitled.

FIRST CLAIM FOR RELIEF

(Breach of Contract - Dale Ostler, Vyron Ostler and Ostler International)

26. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above.

27. Upon information and belief, Plaintiff alleges that it was the agreement of Decedent and Dale Ostler, Vyron Ostler and Ostler International and the custom, usage and course

of dealing of they and any other director and the officers of Ostler International, that all policy of the company would be adopted and implemented and the company managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders Both Decedent and Dale Ostler agreed that in consideration for such agreement of the other and such course of dealing, that they would continue to maintain, operate and conduct the business of Ostler International only for their mutual financial benefit and that neither would commission, engage in or conduct any business policy or activity to which the other did not agree Prior to the death of Decedent, the business of the company was managed, operated and conducted in accordance with and pursuant to said agreement, custom and usage and Decedent, Dale Ostler, Vyron Ostler and Ostler International performed in accordance therewith

28 Upon information and belief, Plaintiff alleges that Decedent and Dale Ostler further agreed that except upon their mutual consent and agreement as shareholders of Ostler International, that shares of the capital stock of the company would neither be offered nor provided to any other person

29. Dale Ostler, Vyron Ostler and Ostler International have breached their agreement with Decedent and with Plaintiff in the particulars as set forth and pled in paragraphs 25(a) to and including 25(f)

30. These Defendants have further breached their agreement and their duty and obligation thereunder, to not adopt or implement or cause or permit Ostler International to adopt or implement any policy or business practice without the approval and consent of Plaintiff as successor in interest to Decedent's right and interest under the Agreement

31 As a consequence of the failure and refusal of these Defendants to recognize and continue to perform in accordance with their agreement, custom, usage and course of dealing with Decedent and their refusal to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler International, Plaintiff does not have an adequate remedy at law against these Defendants and, is entitled to an order of the Court requiring these Defendants to specifically perform in accordance with their agreement, custom, usage and course of dealing with the Decedent and in particular

(a) To adopt and implement policies and business practices of Ostler International only with the mutual consent of Plaintiff or his successor and Dale Ostler

(b) To forthwith call and conduct a meeting of the shareholders, with proper and timely notice to Plaintiff, and to there afford and permit Plaintiff his right to vote the shares of capital stock of Ostler International which he holds as a shareholder of the company

(c) To elect or appoint members of Ostler International's Board of Directors only upon proper and timely notice to Plaintiff or his successor, and the mutual consent of Plaintiff or his successor and Dale Ostler

(d) To not issue additional shares of capital stock of Ostler International without the mutual consent of Plaintiff or his successor and Dale Ostler

(e) To disburse all net earnings of Ostler International in accordance with the custom, course of dealing and agreement between Decedent and Dale

Ostler unless otherwise mutually agreed between Plaintiff or his successor and Dale Ostler.

In the event that the failure of these Defendants to perform in accordance with their agreement, custom and course of dealing with Decedent causes damage to Plaintiff then in that event, Plaintiff is entitled to judgment against such Defendants for damages in an amount to be determined by the Court.

SECOND CLAIM FOR RELIEF

(Breach of Contract - Dale Ostler, Vyron Ostler and Ostler Property Development)

32. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above.

33. Upon information and belief, Plaintiff alleges that it was the agreement of Decedent and Dale Ostler, Vyron Ostler and Ostler Property Development and the custom, usage and course of dealing of they and any other director and the officers of Ostler Property Development, that all policy of the company would be adopted and implemented and the company managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders. Both Decedent and Dale Ostler agreed that in consideration for such agreement of the other and such course of dealing, that they would continue to maintain, operate and conduct the business of Ostler Property Development only for their mutual financial benefit and that neither would commission, engage in or conduct any business policy or activity to which the other did not agree. Prior to the death of Decedent, the business of the company was managed, operated and conducted in accordance with and pursuant

to said agreement, custom and usage and Decedent, Dale Ostler, Vyron Ostler and Ostler Property Development performed in accordance therewith.

34. Upon information and belief, Plaintiff alleges that Decedent and Dale Ostler further agreed that except upon their mutual consent and agreement as a shareholder of Ostler Property Development, that shares of the capital stock of the company would neither be offered nor provided to any other person.

35. Dale Ostler, Vyron Ostler and Ostler Property Development have breached their agreement with Decedent and with Plaintiff in the particulars as set forth and pled in paragraphs 25(a) to and including 25(f).

36. Those Defendants have further breached their agreement and their duty and obligation thereunder, to not adopt or implement or cause or permit Ostler Property Development to adopt or implement any policy or business practice without the approval and consent of Plaintiff as successor in interest to Decedent's right and interest under the Agreement.

37. As a consequence of the failure and refusal of these Defendants to recognize and continue to perform in accordance with their agreement, custom, usage and course of dealing with Decedent and their refusal to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler Property Development, Plaintiff does not have an adequate remedy at law against these Defendants and, is entitled to an order of the Court requiring these Defendants to specifically perform in accordance with their agreement, custom, usage and course of dealing with the Decedent and in particular:

(a) To adopt and implement policies and business practices of Ostler Property Development only with the mutual consent of Plaintiff or his successor and Dale Ostler

(b) To forthwith call and conduct a meeting of the shareholders, with proper and timely notice to Plaintiff, and to there afford and permit Plaintiff his right to vote the shares of capital stock of Ostler Property Development which he holds as a shareholder of the company

(c) To elect or appoint members of Ostler Property Development's Board of Directors only upon proper and timely notice to Plaintiff or his successor, and the mutual consent of Plaintiff or his successors and Dale Ostler

(d) To not issue additional shares of capital stock of Ostler Property Development without the mutual consent of Plaintiff or his successor and Dale Ostler

(e) To disburse all net earnings of Ostler Property Development in accordance with the custom, course of dealing and agreement between Decedent and Dale Ostler unless otherwise mutually agreed between Plaintiff or his successor and Dale Ostler

In the event that the failure of these Defendants to perform in accordance with their agreement, custom and course of dealing with Decedent causes damage to Plaintiff then in that event, Plaintiff is entitled to judgment against such Defendants for damages in an amount to be determined by the Court

THIRD CLAIM FOR RELIEF

(Constructive Trust - Ostler International and Ostler Property Development Shares - Dale Ostler, Ostler International and Ostler Property Development)

38 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

39 The acquisition, holding and ownership of 50% of the shares of capital stock of Ostler International and of Ostler Property Development by Decedent and 50% by Dale Ostler was for the purpose of assuring that neither shareholder could, without the other of them, formulate and implement policy and business practices of Ostler of International and of Ostler Property Development Their purpose was to assure that each would require the consent of the other to the operation and management of both of the companies

40 It was not possible for any policy governing the conduct of the business of Ostler International or of Ostler Property Development to have been validly and legally formulated and implemented without the mutual consent and agreement of both shareholders

41 Since Decedent's death, the policy and business of Ostler International and of Ostler Property Development has been undertaken and pursued by each company and by Dale Ostler all without notice to or the involvement, participation and consent of Plaintiff and all contrary to the purposes, agreement and course of dealing of Decedent and Dale Ostler as the shareholders of each company

42 On principals of equity, Plaintiff is entitled to an order of the Court directed at Dale Ostler, Ostler International and Ostler Property Development declaring the imposition of a constructive trust on all of the shares of capital stock of Ostler International and of Ostler

Property Development, with said shares to be held for the joint and mutual benefit of Dale Ostler and Plaintiff and his successor.

FOURTH CLAIM FOR RELIEF

(Quasi - Contract - Unjust Enrichment - Dale Ostler)

43. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 and paragraphs 39 through 41 above.

44. Decedent and Dale Ostler each thereby conferred a benefit on the other and each had knowledge of said benefit and voluntarily accepted such benefit from the other.

45. Dale Ostler now refuses to permit the policy and business of Ostler International and of Ostler Property Development to be developed and implemented by he and Plaintiff as shareholders of the companies and refuses to cause or permit each said company and its board of directors to condition the formulation and implementation of policy upon the mutual consent and agreement of said shareholders and consequently by his inaction or improper action causes and permits each of the companies to pursue policies and practices to the financial advantage and benefit of Dale Ostler and the disadvantage of Plaintiff causing Dale Ostler to be unjustly enriched thereby.

46. As a consequence of the unjust enrichment of Dale Ostler, Plaintiff has sustained damages in an amount to be determined by the Court and for which Plaintiff is entitled to judgment against Dale Ostler.

FIFTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty - Dale Ostler and Vyron Ostler)

47 Plaintiff incorporates herein the allegations contained in paragraphs 1 thorough 28, 33 and 34, above

48 Dale Ostler and Vyron Ostler as directors and officers of Ostler International and of Ostler Property Development owe a fiduciary duty to Plaintiff, as a shareholder of each company, to neither adopt or implement any policy or conduct any business of such company contrary to Plaintiff's interest as a shareholder in the company and his rights as agreed and extended pursuant to Decedent's agreement express or implied with Dale Ostler and their custom, usage and course of dealing and that of the directors and officers of each company

49 Dale Ostler and Vyron Ostler have breached their fiduciary duty to Plaintiff by engaging in the conduct as more particularly set forth in paragraph 25, above

50 As a consequence of the breach by said Defendants of their fiduciary duty owing to Plaintiff, Plaintiff as successor in interest to Decedent, has sustained damages in an amount to be determined by the Court and for which Plaintiff is entitled to judgment against Dale Ostler and Vyron Ostler, jointly and severally

SIXTH CLAIM FOR RELIEF

(Promissory Estoppel - Dale Ostler)

51 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

52 Decedent and Dale Ostler as shareholders of Ostler International and of Ostler Property Development promised each other that policies for the operation and conduct of the

business of each company would be adopted and implemented only with and based upon their mutual consent.

53. Decedent acted in reasonable reliance on the promises made by Dale Ostler who should and did reasonably expect Decedent to so rely and as a consequence thereof, Decedent did similarly promise to Dale Ostler and in so doing, did not adopt or implement any policy of Ostler International or of Ostler Property Development without the consent of Dale Ostler.

54. Dale Ostler was aware of the mutual promises so made by he and Decedent and of all facts material thereto and knew that Decedent relied on Dale Ostler's promises so made.

55. As a consequence of the failure and refusal of Dale Ostler to recognize and continue to perform in accordance with his promises made to Decedent and his refusal to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler International and of Ostler Property Development, Plaintiff does not have an adequate remedy at law against Dale Ostler and, is entitled to an order of the Court requiring Dale Ostler to specifically perform in accordance with his promises made to Decedent and in particular:

(a) To adopt and implement policies and business practices of Ostler International and Ostler Property Development only with the mutual consent of Plaintiff or his successor and Dale Ostler.

(b) To forthwith call and conduct a meeting of the shareholders, with proper and timely notice to Plaintiff, and to there afford and permit Plaintiff his right to vote the shares of capital stock of Ostler International and of Ostler Property Development which he holds as a shareholder of each company.

(c) To elect or appoint members of the Board of Directors of Ostler International and of Ostler Property Development only upon proper and timely notice to Plaintiff or his successor, and the mutual consent of Plaintiff or his successor and Dale Ostler

(d) To not issue additional shares of capital stock of Ostler International and of Ostler Property Development without the mutual consent of Plaintiff or his successor and Dale Ostler

(e) To disburse all net earnings of Ostler International and of Ostler Property Development in accordance with the custom, course of dealing and agreement between Decedent and Dale Ostler unless otherwise mutually agreed between Plaintiff or his successor and Dale Ostler

In the event that the failure of Dale Ostler to perform in accordance with his promises made to Decedent causes damage to Plaintiff then in that event, Plaintiff is entitled to judgment against Dale Ostler for damages in an amount to be determined by the Court

SEVENTH CLAIM FOR RELIEF

(Accounting - All Defendants)

56 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

57 Plaintiff is entitled to an order of the Court requiring that Defendants provide to Plaintiff during the pendency of this action, (1) all of the records, information and reports of Ostler International and of Ostler Property Development as contemplated and provided by §§ 16-10a-1601 and 16-10a-1602, Utah Code Ann and not limited to excerpts from or summaries of

said records and reports In addition, Plaintiff is entitled to an order requiring that Defendants provide to Plaintiff during the pendency of this action, (2) an audited financial statement for each company for each calendar year prepared in accordance with generally accepted accounting principals, (3) unaudited financial statements for each company for each calendar month during the pendency of this action and showing in reasonable detail the assets and liabilities of the company and the results of the company's business operations, (4) the number of shares of capital stock of each company which on December 31, 2003 were proposed or committed to be issued to any person and the name of such person and (5) the number of shares of capital stock of each company which on December 1, 2004 were proposed or committed to be issued to any person and the name of each such person

EIGHTH CLAIM FOR RELIEF

(Declaratory Judgment - All Defendants)

58. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

59. Plaintiff is entitled to judgment pursuant to §§ 78-33-1 through 78-33-13, Utah Code Annotated, declaring that Dale Ostler, Vyron Ostler, Ostler International, Ostler Property Development and all officers and directors of Ostler International and of Ostler Property Development are obligated to Plaintiff and Plaintiff's successors and assigns, as shareholders of the companies, and as follows

(a) To permit Plaintiff and Plaintiff's successors and assigns to be involved in the formulation and implementation of policies for the conducting of the business of Ostler International and of Ostler Property Development and to

neither adopt or implement policies or conduct business of the companies to which Plaintiff or his successors and assigns are not in agreement.

(b) To cause there to be called at least annually a meeting of shareholders of Ostler International and of Ostler Property Development and there permit Plaintiff or his successors and assigns the right and opportunity to vote their shares of capital stock of Ostler International and of Ostler Property Development.

(c) To neither nominate, appoint or elect members of the Board of Directors of Ostler International and of Ostler Property Development without notice to, consulting with and obtaining the agreement of the Plaintiff or Plaintiff's successors and assigns.

(d) To neither cause nor permit any current and existing members of the Board of Directors of Ostler International and of Ostler Property Development from serving or continuing to serve as Directors without the mutual consent of Dale Ostler and Plaintiff or Plaintiff's successor or assigns.

(e) To cause both Ostler International and Ostler Property Development to reacquire any shares of capital stock of such company issued without the consent of Decedent or Plaintiff and that such shares be reacquired by the issuing company with no cost, expense or loss to Plaintiff or any diminishment in the value of the shares of capital stock held by Plaintiff.

(f) To not issue or cause to be issued any shares of the capital stock of Ostler International or of Ostler Property Development without the consent of Plaintiff or Plaintiff's successors or assigns.

(g) To cause all or such fractional portion of the net income of Ostler International and of Ostler Property Development as historically disbursed to Decedent and to Dale Ostler, to be disbursed and paid over to shareholders regularly and approximately quarterly, unless consent and authorization is otherwise first obtained from Dale Ostler and from Plaintiff or Plaintiff's successors and assigns,

NINTH CLAIM FOR RELIEF

(Injunction - all Defendants)

60. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above.

61. Plaintiff is entitled to a temporary restraining order and a preliminary injunction during the pendency of this action enjoining Defendants from:

(a) Preventing or discouraging Plaintiff and Plaintiff's successors and assigns from being engaged in the formulation and implementation of policies for the conducting of the business of Ostler International and of Ostler Property Development and from adopting or implementing policies to which Plaintiff or his successors and assigns are not in agreement.

(b) Failing to cause there to be called at least annually a meeting of shareholders of Ostler International and of Ostler Property Development

and there permitting Plaintiff or his successors and assigns the right and opportunity to vote their shares of capital stock of Ostler International and of Ostler Property Development

(c) Nominating, appointing or electing members of the Board of Directors of Ostler International and of Ostler Property Development without notice to, consulting with and obtaining the agreement of the Plaintiff or Plaintiff's successors and assigns

(d) Causing or permitting any current and existing members of the Board of Directors of Ostler International and of Ostler Property Development to serve or continuing to serve as Directors without the mutual consent of Dale Ostler and Plaintiff or Plaintiff's successor or assigns

(e) Issuing or causing to be issued any shares of the capital stock of Ostler International and of Ostler Property Development without the consent of Plaintiff or Plaintiff's successors or assigns

(f) Permitting or accepting the voting of any shares of the capital stock of Ostler International and of Ostler Property Development issued without the consent of Decedent or of Plaintiff or Plaintiff's successors or assigns

(g) Failing to disburse and pay over to Shareholders of Ostler International and Ostler Property Development regularly and approximately quarterly all or such fractional portion of the net income of each company as historically disbursed to Decedent and to Dale Ostler, unless consent and

authorization is otherwise first obtained from Dale Ostler and from Plaintiff or Plaintiff's successors and assigns

62 Plaintiff is entitled, at the conclusion of this action, to a permanent injunction enjoining the Defendants, their successors and any assigns all as provided in paragraph 61, and further, from causing or permitting, without the written mutual approval and consent of Dale Ostler and Plaintiff or Plaintiff's successors and assigns, the adoption or implementation of any policy of Ostler International or of Ostler Property Development or the causing of either company to engage in or conduct its business

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows

1 On his FIRST CLAIM FOR RELIEF, for a decree of specific performance against Dale Ostler, Vyron Ostler and Ostler International requiring the performance by said Defendants, their successors and assigns all as provided in paragraph 31 and for judgment against said Defendants for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

2 On his SECOND CLAIM FOR RELIEF, for a decree of specific performance against Dale Ostler, Vyron Ostler and Ostler Property Development requiring the performance by said Defendants, their successors and assigns all as provided in paragraph 37 and for judgment against said Defendants for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

3 On his THIRD CLAIM FOR RELIEF, for an order of the Court directed at Dale Ostler, Ostler International and Ostler Property Development imposing and creating a constructive trust on all of the shares of capital stock of Ostler International and of Ostler

Property Development with said shares to be held for the joint and mutual benefit of Dale Ostler and Plaintiff and his successor Plaintiff further prays for such other relief as the Court may deem proper in the premises

4 On his FOURTH CLAIM FOR RELIEF, for judgment against Dale Ostler for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

5 On his FIFTH CLAIM FOR RELIEF, for judgment against Dale Ostler and Vyron Ostler, jointly and severally, for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

6 On his SIXTH CLAIM FOR RELIEF, for a decree of specific performance against Dale Ostler requiring the performance by said Defendant, his successors and assigns all as provided in paragraph 55 and for judgment against said Defendant for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

7 On his SEVENTH CLAIM FOR RELIEF, for an order declaring and requiring that Defendants and each of them, provide an accounting and information in accordance with and pursuant to the requirements as set forth in paragraph 57 of the Complaint

8 On his EIGHTH CLAIM FOR RELIEF, for a judgment declaring that Dale Ostler, Vyron Ostler, Ostler International, Ostler Property Development and the other officers and directors of Ostler International and of Ostler Property Development are obligated, as a matter of law, to Plaintiff and Plaintiff's successors and assigns to adopt and implement policy of and for Ostler International and for Ostler Property Development and to conduct the business of each

company only in accordance with and pursuant to the requirements as set forth in paragraph 59 of this Complaint.

9. On his NINTH CLAIM FOR RELIEF, for a temporary restraining order and a preliminary injunction during the pendency of this action enjoining Defendants, their successors and assigns all as provided in paragraph 61 of this Complaint. Further, for a permanent injunction to be issued at the conclusion hereof enjoining the Defendants, their successors and any assigns all as provided in paragraph 61, and from causing or permitting, without the written mutual approval and consent of Dale Ostler and Plaintiff or Plaintiff's successors and assigns, the adoption or implementation of any policy of Ostler International and of Ostler Property Development or the causing of Ostler International or Ostler Property Development to engage in or conduct its business without the mutual approval and consent of Dale Ostler or any of his assigns, and of Plaintiff or his successors and assigns.

10. On ALL CLAIMS FOR RELIEF for costs of court and such further relief as the Court may deem proper in the premises.

DATED this 15th day of December, 2004.

NIELSEN & SENIOR

Gary A. Weston
E. Jay Peck
Attorneys for Plaintiff

Plaintiff's Address:
Douglas L. Stowell, Esq.
307 East Stanton Avenue
Salt Lake City, Utah 84111

Tab 4

the trust agreement and the shares must be registered in the name of the trustee. Typically, the trust agreement provides that all attributes of beneficial ownership other than the power to vote are retained by the beneficial owners. In addition, the voting trustees may issue to the beneficial owners voting trust certificates which may be transferable in much the same way as shares.

Upon the creation of the voting trust, the trustees must prepare a list of the beneficial owners and deliver it, together with a copy of the agreement, to the corporation's principal office, where both documents are available for inspection by shareholders under section 720. This simple disclosure requirement eliminates the possibility that the voting trust may be used to create "secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of non-participating shareholders." *Lehrman v. Cohen*, 222 A.2d 800, 807 (Del. 1966).

The purpose of section 730 is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10-year maximum should be treated as being valid for the maximum permissible term of 10 years.

b. *Extension or Renewal of Voting Trust.*

Section 730(3) permits a voting trust to be extended for successive terms of up to 10 years, commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

731. Voting Agreements

Section 731(1) explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. These agreements are often referred to as "pooling agreements." The only formal requirements are that they be in writing and signed by all the participating shareholders; in other respects their validity is to be judged as any other contract. They are not subject to the 10-year limitation applicable to voting trusts.

Section 731(2) provides that voting agreements may be specifically enforceable. A voting agreement may provide its own enforcement mechanism, as by the appointment of a proxy to vote all shares subject to the agreement; the appointment may be made irrevocable under section 722. If no enforcement mechanism is provided, a court may order specific enforcement of the agreement and order the votes cast as the agreement contemplates. This section recognizes that damages are not likely to be an appropriate remedy for breach of a voting agreement, and also avoids the result reached in *Ringling Bros. Barnam & Bailey Combined Shows v. Ringling*, A.2d 441 (Del. 1947), where the court held that the appropriate remedy to enforce a pooling agreement was to refuse to permit any voting of the breaching party's shares.

732. Shareholder Agreements

Shareholders of closely-held corporations, ranging from family businesses to joint ventures owned by large public corporations, frequently enter into agreements that govern the operation of the enterprise. In the past, various types of shareholder agreements were invalidated by courts for a variety of reasons, including so-called "sterilization" of the board of directors and failure to follow the statutory norms of the applicable corporation act. See, e.g., *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77 N.E.2d 633 (1948). The more modern decisions reflect a greater willingness to uphold shareholder agreements. See, e.g., *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964). In addition, many state corporation acts now contain provisions validating shareholder agreements. Earlier versions of the Model Act had never expressly validated shareholder agreements.

Rather than relying on further uncertain and sporadic development of the law in the courts, section 732, which was added to the Model Act in 1991, rejects the older line of cases. It adds an important element of predictability previously absent from the Model Act and affords participants in closely-held corporations greater contractual freedom to tailor the rules of their enterprise. The drafters have elected to add section 732 of the Model Act to the Revised Act.

Section 732 is not intended to establish or legitimize an alternative form of corporation. Instead, it is intended to add, within the context of the traditional corporate structure, legal certainty to shareholder agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. The subject matter of these arrangements includes governance of the entity, allocation of the economic return from the business, and other aspects of the relationships among shareholders, directors and the corporation which are part of the business arrangement. Section 732 also recognizes that many of the corporate norms contained in the Model Act (and Revised Act), as well as the corporation statutes of most states, were designed with an eye towards public companies, where management and share ownership are quite distinct. Cf. 1 O'Neal & Thompson, O'Neal's Close Corporations, section 5.06 (3d ed.). These functions are often conjoined in the close corporation. Thus, section 732 validates for nonpublic corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Model Act and Revised Act.

Importantly, section 732 only addresses the parties to the shareholder agreement, their transferees, and the corporation, and does not have any binding legal effect on the state, creditors, or other third persons.

Section 732 supplements the other provisions of the Model Act and Revised Act. If an agreement is not in conflict with another section of the Revised Act, no resort need be made to section 732, with its requirement of unanimity. For example, special provisions can be included in the articles of incorporation or bylaws with less than unanimous shareholder agreement so long as such provisions are not in conflict with other provisions of the Revised Act. Similarly, section 732 would not have to be relied upon to validate typical buy-sell agreements among two or more shareholders or the covenants and other terms of a stock purchase agreement entered into in connection with the issuance of shares by a corporation.

The types of provisions validated by section 732 are many and varied. Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of section 732(1) is, ipso facto, a type of agreement that is not valid unless it complies with section 732. Section 732(1) also contain a "catch all" which adds a measure of flexibility to the seven enumerated categories.

Omitted from the enumeration in section 732(1) is a provision found in the Close Corporation Supplement and in the statutes of many of the states, broadly validating any arrangement the effect of which is to treat the corporation as a partnership. This type of provision was considered to be too elastic and indefinite, as well as unnecessary in light of the more detailed enumeration of permissible subject areas contained in section 732(1). Note, however, that under section 732(6) the fact that an agreement authorized by section 732(1) or its performance treats the corporation as a partnership is

not a ground for imposing personal liability on the parties if the agreement is otherwise authorized by subsection (1)

a *Section 732(1)*

Subsection (1) is the heart of section 732 It states that certain types of agreements are effective among the shareholders and the corporation even if inconsistent with another provision of the Revised Act Thus, an agreement authorized by section 732 is, by virtue of that section, "not inconsistent with law within the meaning of sections 202(2)(b) and 206(2) of the Revised Act In contrast, a shareholder agreement that is not inconsistent with any provisions of the Revised Act is not subject to the requirements of section 732

The range of agreements validated by section 732(1) is expansive, though not unlimited The most difficult problem encountered in crafting a shareholder agreement validation provision is to determine the reach of the provision Some states have tried to articulate the limits of a shareholder agreement validation provision in terms of negative grounds, stating that no shareholder agreement shall be invalid on certain specified grounds *See e g* Del Code Ann Tit 8, sections 350 354 (1983) N C Gen Stat section 55-73(b)(1982) The deficiency in this type of statute is the uncertainty introduced by the ever present possibility of articulating another ground on which to challenge the validity of the agreement Other states have provided that shareholder agreements may waive or alter all provisions in the corporation act except certain enumerated provisions that cannot be varied *See e g* Cal Corp Code section 300(b)-(c) (West 1989 and Supp 1990) The difficulty with this approach is that any enumeration of the provisions that can never be varied will almost inevitably be subjective arbitrary, and incomplete

The approach chosen in section 732 is more pragmatic It defines the types of agreements that can be validated largely by illustration The seven specific categories that are listed are designed to cover the most frequently used arrangements The outer boundary is provided by section 732(1)(h) which provides an additional 'catch all" for any provisions that, in a manner inconsistent with any other provision of the Revised Act, otherwise govern the exercise of the corporate powers, the management of the business and affairs of the corporation, or the relationship between and among the shareholders, the directors, and the corporation or any of them Section 732(1) validates virtually all types of shareholder agreements that, in practice normally concern shareholders and their advisors

Given the breadth of section 732(1), any provision that may be contained in the articles of incorporation with a majority vote under sections 202(2)(b)(i) and (ii), as well as under section 841 may also be effective if contained in a shareholder agreement that complies with section 732

The provisions of a shareholder agreement authorized by section 732(1) will often, in operation, conflict with the literal language of more than one section of the Revised Act, and courts should in such cases construe all related sections of the Revised Act flexibly and in a manner consistent with the underlying intent of the shareholder agreement Thus, for example, in the case of an agreement that provides for weighted voting by directors, every reference in the Revised Act to a majority or other proportion of directors should be construed to refer to a majority or other proportion of the votes of the directors

While the outer limits of the catch-all provision of subsection 732(1)(h) are left uncertain, there are provisions of the Revised Act that cannot be overridden by resort to the catch-all. Subsection (1)(h), introduced by the term "otherwise," is intended to be read in context with the preceding seven subsections and to be subject to a *ejusdem generis* rule of construction Thus, in defining the outer limits, courts should consider whether the variation from the Revised Act under consideration is similar to the variations permitted by the first seven subsections Subsection (1)(h) is also subject to a public policy limitation, intended to give courts express authority to restrict the scope of the catch-all where there are substantial issues of public policy at stake For example, a shareholder agreement that provides that the directors of the corporation have no duties of care or loyalty to the corporation or the shareholders would not be within the purview of section 732(1)(h), because it is not sufficiently similar to the types of arrangements suggested by the first seven subsections of section 732(1) and because such a provision could be viewed as contrary to a public policy of substantial importance Similarly, a provision that exculpates directors from liability more broadly than permitted by section 841 likely would not be validated under section 732, because as the commentary to section 841 states, there are serious public policy reasons which support the few limitations that remain on the right to exculpate directors from liability Further development of the outer limits is left, however, for the courts

As noted above shareholder agreements otherwise validated by section 732 are not legally binding on the state on creditors, or on other third parties For example an agreement that dispenses with the need to make corporate filings required by the Revised Act would be ineffective Similarly, an agreement among shareholders that provides that only the president has authority to enter into contracts for the corporation would not, without more be binding against third parties, and ordinary principles of agency, including the concept of apparent authority, would continue to apply

b *Section 732(2)*

Section 732 minimizes the formal requirements for a shareholder agreement so as not to restrict unduly the sharehold ers ability to take advantage of the flexibility the section provides Thus unlike comparable provisions in special close corporation legislation, it is not necessary to "opt in" to a special class of close corporations in order to obtain the benefits of section 732 An agreement can be validated under section 732 whether it is set forth in the articles of incorporation the bylaws or in a separate agreement and whether or not section 732 is specifically referenced in the agreement The principal requirements aresimply that the agreement be in writing and be approved or agreed to by all persons who are then shareholders Where the corporation has a single shareholder, the requirement of an "agreement among the shareholders" is satisfied by the unilateral action of the shareholder in establishing the terms of the agreement, evidenced by provisions in the articles or bylaws, or in a writing signed by the sole shareholder Although a writing signed by all the shareholders is not required where the agreement is contained in articles of incorporation or bylaws unanimously approved, it may be desirable to have all the shareholders actually sign the instrument in order to establish unequivocally their agreement Similarly, while transferees are bound by a valid shareholder agreement, it may be desirable to obtain the affirmative written assent of the transferee at the time of the transfer Subsection (2) also established and permits amendments by less than unanimous agreement if the shareholder agreement so provides

Section 732(2 requires unanimous shareholder approval regardless of entitlement to vote Unanimity is required because an agreement authorized by section 732 can effect material organic changes in the corporation's operation and structure, and in the rights and obligations of shareholders

The requirement that the shareholder agreement be made known to the corporation is the predicate for the requirement in subsection (3) that share certificates or information statements be legended to note the existence of the agreement No specific form of notification is required and the agreement need not be filed with the corporation In the case of shareholder agreements in the articles or bylaws, the corporation

will necessarily have notice. In the case of shareholder agreements outside the articles or bylaws, the requirement of signature by all of the shareholders will in virtually all cases be sufficient to constitute notification to the corporation, as one or more signatories will normally also be a director or an officer.

c. *Section 732(3).*

Section 732(3) addresses the effect of a shareholder agreement on subsequent purchasers or transferees of shares. Typically, corporations with shareholder agreements also have restrictions on the transferability of the shares as authorized by section 627 of the Revised Act, thus lessening the practical effects of the problem in the context of voluntary transferees. Transferees of shares without knowledge of the agreement or those acquiring shares upon the death of an original participant in a close corporation may, however, be heavily impacted. Weighing the burdens on transferees against the burdens on the remaining shareholders in the enterprise, section 732(3) affirms the continued validity of the shareholder agreement on all transferees, whether by purchase, gift, operation of law, or otherwise. Unlike restrictions on transfer, it may be impossible to enforce a shareholder agreement against less than all o the shareholders. Thus, under section 732, one who inherit shares subject to a shareholder agreement must continue to abide by the agreement. If that is not the desired result, care must be exercised at the initiation of the shareholder agreement to ensure a different outcome, such as providing for a buy-back upon death.

Where shares are transferred to a purchaser without knowledge of a shareholder agreement, the validity of the agreement is similarly unaffected, but the purchaser is afforded a rescission remedy against the seller. The term "purchaser" imports consideration. Under subsection (3) the time at which notice to a purchaser is relevant for purposes of determining entitlement to rescission is the time when a purchaser acquires the shares rather than when a commitment is made to acquire the shares. If the purchaser learns of the agreement after becoming committed to purchase but before the acquisition of the shares, the purchaser should not be permitted to proceed with the purchase and still obtain the benefits of the remedies in section 732(3). Moreover, under contract principles and the securities laws a failure to disclose the existence of a shareholder agreement would in most cases constitute the omission of a material fact and may excuse performance of the commitment to purchase. The term purchaser includes a person acquiring shares upon initial issue or by transfer, and also includes a pledgee, for whom the time of purchase is the time the shares are pledged.

Section 732 addresses the underlying rights that accrue to shares and shareholders and the validity of shareholder action which redefines those rights, as contrasted with questions regarding entitlement to ownership of the security, competing ownership claims, and disclosure issues. Consistent with this dichotomy, the rights and remedies available to purchasers under section 732(3) are independent of those provided by contract law, article 8 of the Uniform Commercial Code, the securities laws and others outside the Revised Act. With respect to the related subject of restrictions on transferability of shares, note that section 732 does not directly address or validate such restrictions, which are governed instead by section 627 of the Act. However, if such restrictions are adopted as a part of a shareholder agreement that complies with the requirements of section 732, a court should construe broadly the concept of reasonableness under section 627 in determining the validity of such restrictions.

Section 732(3) contains an affirmative requirement that the share certificate or information statement for the shares be legended to note the existence of a shareholder agreement. No specified form of legend is required, and a simple statement that "[t]he shares represented by this certificate are subject to a shareholder agreement" is sufficient. At that point a purchaser must obtain a copy of the shareholder agreement from the transferor or proceed at the purchaser's peril. In the event a corporation fails to legend share certificates or information statements, a court may, in an appropriate case, imply a cause of action against the corporation in favor of an injured purchaser without knowledge of a shareholder agreement. The circumstances under which such a remedy would be implied, the proper measure of damages, and other attributes of and limitations on such an implied remedy are left to development in the courts.

If the purchaser has no actual knowledge of a shareholder agreement, and is not charged with knowledge by virtue of a legend on the certificate or information statement, the purchaser has a rescission remedy against the transferor (which would be the corporation in the case of a new issue of shares). While the statutory rescission remedy provided in subsection (3) is nonexclusive, it is intended to be a purchaser's primary remedy.

If the shares are certificated and duly legended, a purchaser is charged with notice of the shareholder agreement even if the purchaser never saw the certificate. Thus, a purchaser is exposed to risk if the purchaser does not ask to see the certificate at or prior to the purchase of the shares. In the case of uncertificated shares, however, the purchaser is not charged with notice of the shareholder agreement unless a duly-legended information statement is delivered to the purchaser at or prior to the time of purchase. This different rule for uncertificated shares is intended to provide an additional safeguard to protect innocent purchasers, and is necessary because section 626(2) of the Revised Act and section 8-408 of the U.C.C. permit delivery of information statements after a transfer of shares.

d. *Section 732(4).*

Section 732(4) contains a self-executing termination provision for a shareholder agreement when the shares of the corporation become publicly held. The statutory norms in the Revised Act become more necessary and appropriate as the number of shareholders increases, as there is greater opportunity to acquire or dispose of an investment in the corporation, and as there is less opportunity for negotiation over the terms under which the enterprise will be conducted. Given that section 732 requires unanimity, however, in most cases a practical limit on the availability of a shareholder agreement will be reached before a public market develops. Subsection (4) rejects the use of an absolute number of shareholders in determining when the shelter of section 732 is lost.

Section 732(5) through (7) contain a number of technical provisions. Subsection (5) provides a shift of liability from the directors to any person or persons in whom the discretion or powers otherwise exercised by the board of directors are vested. A shareholder agreement which provides for such a shift of responsibility, with the concomitant shift of liability provided by subsection (5), could also provide for exculpation from that liability to the extent otherwise authorized by the Revised Act. The transfer of liability provided by subsection (5) covers liabilities imposed on directors "by law," which is intended to include liabilities arising under the Revised Act, the common law, and statutory law outside the Revised Act. Nevertheless, there could be cases where subsection (5) is ineffective and where a director is exposed to liability *qua* director, even though under a shareholder agreement the director may have given up some or all of the powers normally exercised by directors.

Subsection (6), based on the Close Corporation Supplement of the Model Act and the Texas statute, narrows the grounds for imposing personal liability on shareholders for the liabilities of a corporation for acts or omissions authorized by a

shareholder agreement validated by section 732 Subsection (7) addresses shareholder agreements for corporations that are in the process of being organized and do not yet have shareholders

The Revised Act does not, of course, address the tax status of a corporation formed under the Revised Act When an unorthodox arrangement is established pursuant to a shareholder agreement authorized by section 732, that corporation could in some circumstances be deemed a partnership for tax purposes an issue to which counsel should be attuned, but which is not addressed in the Revised Act See Treas Reg section 301 7701-1 (as amended in 1977), Rev Rul 88-76, 1988 2 C B 360 (company organized pursuant to Wyoming Limited Liability Company statute, classified for federal tax purposes as a partnership)

Subpart D

Derivative Proceedings

740. Procedure in Derivative Proceedings

The Model Act was amended in 1990 to include a series of sections providing detailed procedures and requirements for shareholder derivative suits The new provisions reflect a reappraisal of issues such as (a) whether demand upon the board of directors is required, and (b) the power of independent directors to dismiss a derivative suit

A great deal of controversy has surrounded the derivative suit, and widely different perceptions continue to exist as to the efficacy of such litigation It was beyond the scope of the effort undertaken by the Utah Business Corporation Act Revision Committee to analyze the various issues surrounding shareholder derivative suits or to suggest a solution to those issues The drafters felt the issue would be better addressed by a more focused effort conducted by a group representing the various interests typically involved in such suits We would encourage a future review of the issues surrounding derivative suits and consideration of the desirability of implementing the procedures and requirements imposed in the Model Act The enactment of new procedures would require appropriate modifications of Rule 23 1 of the Utah Rules of Civil Procedure

Section 740 follows the Model Act language that was superseded by the recent modifications to the Model Act This language is patterned in part after the procedures applicable to derivative actions as set forth in Rule 23 1 of both the Federal and Utah Rules of Civil Procedure The Revised Act specifies that the Utah rule is applicable to derivative actions covered by Section 740

a *Procedural Requirements*

The procedural requirements imposed by section 740 are as follows

1 The plaintiff may be either a registered or beneficial owner of shares

Many statutes including early versions of the Model Act, required the plaintiff to be a shareholder "of record" This limiting requirement was dropped in revising section 740, in light of the widespread use of street name or nominee ownership of shares At the same time, it was determined that the beneficial owner of shares held in a voting trust should also be permitted to serve as a plaintiff in a derivative suit These changes were accomplished by the addition of a special definition of shareholder" in subsection (6) to broaden the definition of that term in section 102

2 The plaintiff must have been an owner of shares at the time of the transaction in question

The Model Act and the statutes of many states have long imposed a "contemporaneous ownership" rule, i e , the plaintiff must have been an owner of shares at the time of the transaction in question This rule has been criticized as being unduly narrow and technical and unnecessary to prevent the transfer or purchase of lawsuits A few states, particularly California, Cal G C L Section 800(B), have relaxed this rule to the extent of allowing some subsequent purchasers of shares to be plaintiffs in limited circumstances

The decision to retain the contemporaneous ownership rule in section 740 was based primarily on the view that it was simple, clear, and easy to apply while the California approach might encourage litigation on peripheral issues like the extent of the plaintiff's knowledge of the transaction in question when the shares were acquired Further, there has been no persuasive showing that the contemporaneous ownership rule has prevented the litigation of substantial suits since there appear to be many persons who might qualify as plaintiffs to bring suit even if subsequent purchasers are disqualified

3 The complaint must be verified

Section 740(2) requires the complaint in a derivative suit to be verified, i e , sworn to Compare Federal Rules of Civil Procedure, Rule 23 1, *Surowitz v Hilton Hotels Corp* , 383 U S 363 (1966) This requirement provides some protection against groundless litigation without deterring suits brought in good faith

4 Option holders and convertible debenture holders are not permitted to sue

Arguments may be made that long-term creditors and investors with the privilege of becoming shareholders by the exercise of options or conversion rights should be permitted to bring derivative suits These arguments, however, appear to involve the substantive rights of these various classes of investors more than the procedures required for the assertion of derivative rights on behalf of the corporation See e g *Harn v Kerkorian*, 324 A 2d 215 (Del Ch 1974), rev'd in part, 347 A 2d 133 (Del 1975) Therefore section 740(1) does not permit option holders or convertible debenture holders to serve as derivative plaintiffs

5 There must be prior notice and demand on directors in most circumstances

The purpose of a demand on the board of directors is to stimulate the board of directors to enforce the rights of the corporation on its own Modern trends in corporate governance, particularly the increasing number of outside directors and greater director sensitivity to their roles in the corporation and to the possibility of personal liability, improve the likelihood that the board of directors will weigh carefully the shareholder's demand Therefore, section 740(2) requires an allegation with particularity of the demand made, if any, on the board of directors On the other hand, there may be circumstances showing that a demand on the board of direc tors would be useless and in those circumstances it should be sufficient to allege the reasons why the plaintiff did not make the demand

Of itself, the rejection by the board of directors of the shareholder's demand neither permits nor precludes the shareholder's suit

6 A court may stay a derivative suit while the board of directors investigates

The last sentence of section 740(2) provides that if the corporation undertakes an investigation, the court may stay the proceeding until the investigation of the charges made in the demand or complaint is completed The purpose of this stay is to preserve the right of the board of directors to consider whether or not to seek to enforce on its own the corporation's claim

7 Recovery of reasonable expenses of suit, including attorneys' fees, if suit brought without good cause